Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

KATHY SUE JOHNSON, etc. et al., and DARCEL MILTON, etc. et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the deliberate exclusion solely on account of race of hundreds of black children annually and not a single white child from two Chicago public high schools an impairment of the black childrens' constitutional rights?

2. Is such a racially-based exclusion of blacks rendered lawful by a school board's stated purpose of preventing white flight in a racially changing neighborhood—especially where the program has effectively denied an integrated education to most of the excluded black children?

3. Does a school board's asserted purpose of preventing two schools from becoming predominantly black justify an explicit racial classification which places the entire burden of the board's policy on black children alone?

4. Does the Board's stated purpose preclude strict judicial scrutiny of its actual motives where the Board has consistently failed to adopt less discriminatory alternatives which equalize the burdens between blacks and whites?

LIST OF PARTIES

Plaintiffs (various children in the Morgan Park and Gage Park areas by their parent or guardian): Kathy Sue Johnson, by Shelby Johnson; Lynne M. Stevenson and James Stevenson, by Charles E. James; Karla Evans by Annie Evans; Linda A. Green by Reginald S. Green; Yrhonda T. Hawkins, by Joseph Hawkins; Gregory D. Robinson and Dereen R. Herron, by Anita Robinson Herron; Tammie I. Hickey, by Ben W. Hickey; Kimberly Ann Johnson, by Brenda M. Johnson; Tobbie L. McCline, by Franklin L. Jones; James E. Martin, Jr., by Mary Martin; Madge Mathews, by Lillie M. Mathews; Donnell Traylor, by Anita Traylor; Darcel Milton, by Reverend Frank E. Milton; Sherry Rhodes, by Betty J. Allen; Edward Banks and Torrence Banks, by LaVolia Banks; Gwendolyn Brown and Yvonne Brown, by Florence Jackson; Renard Cleggett and Retunja Cleggett, by Louise Cleggett; Will A.

Collins, by Hattie Collins; April Dotson, Hope Dotson and Cleon Dotson, by Sallie Dotson; Phyllis Graham, by Florence Graham; Charlotte Jackson, by Frank Jackson; Dorothy Ann Laseter, by Windell Laseter, Sr.; Earl D. Liggins, by Annie Hammond; Andrienne R. Reed and Joy Marcia Reed by Dorothy Kingsley; Lonnetta Manuel and Regina Manuel, by Lonnetta Manuel; Sarah McNuckle, by Elma McNuckle; Melvin Parker, by Murtis Parker; James Pigue, by Frankie Pigue; Olivia Riggins and Judy Riggins, by Virdie Riggins; Bernard Robinson and LaWanda Scott, by Yvonne Robinson; Judy Strong, by David Strong; Lori Waller and Eric Waller, by Ethea Waller; Timothy Christmas, by Cora Watson; Felicia Nickols, by Barbara A. Nickols; Regina Ausley, by Corrie Ausley; Demetria Baker, by Dora Baker; Adrienne Michele Clayton, by Christine Clayton; Hazel C. Faulkner, by Minnie Faulkner; Gueterris Johnson, by Eldora Johnson; Rochelle Knight, by Dorothy Knight; Gail McLaurin, by Bernice McLaurin; Teresa Mumphus, by Dorothy Mumphus; Donnell Robison, by Bessie Baker; Antoine Nelson, by Ruth Nelson; Derrick Shelton, by Charles Shelton; Ruby Lynette Turner, by William Turner; Leonita Renee White, by Lolita R. White; Cynthia Wilkins, by Bernice Wilkins; Stephan Williams and Veronica Williams, by Theressa Williams; Bryce Wormley and Sharon Bell, by Carole Wormley; Delaine Ellens, by Arthur W. Ellens; Rose S. Myatt, by Velma Myatt; Janelle Parker, by Lincoln B. Parker; and Sylvia L. Westbrook, by John L. Westbrook.

Defendants: Board of Education of the City of Chicago; John D. Carey, Mrs. Carey B. Preston, Edgar G. Epps, Bernard S. Friedman, Mrs. Louis A. Malis, Henry W. McGee, Thomas J. Naydar, Mrs. William L. Rohter, Gerald L. Sbarbaro, Mrs. Carmen Velasquez and Mrs. W. Lydon Wild, individual members of the Board of Education of the City of Chicago, and Joseph P. Hannon, General Superintendent of Schools.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTRODUCTORY STATEMENT

This cause is before this Court for the second time. On July 2, 1980, this Court granted *certiorari* in No. 79-1356, to consider the legality of the racial quota plan adopted by respondents which excluded only blacks from their neighborhood schools. 100 S.Ct. 3055. After petitioners filed their brief on the merits, respondents announced they would abandon the quota plan, and filed a suggestion of mootness. On October 20, 1980, this Court vacated the Court of Appeals' decision and remanded for consideration of respondents' Suggestion of Mootness. 101 S.Ct.

339. While the case was pending in the District Court after remand, respondents readopted the very quota plan they had previously purported to abandon. Both the District Court and Court of Appeals have now held that the case is not moot.

Accordingly, petitioners respectfully pray that this Court issue a writ of *certiorari* to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit upholding the quota plan.

OPINIONS BELOW

The opinions of the Court of Appeals, the first of which is reported at 604 F.2d 504, and the unreported orders, findings of fact and conclusions of law of the District Court, are reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals declaring the case was not moot, and reinstating the order vacated by this Court, was entered on November 24, 1981. This petition for *certiorari* was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Section 1:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

20 U.S.C. §1703(c):

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> > (C) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;"

STATEMENT OF THE CASE

At issue in this case is the legality of racial quotas allegedly designed to preserve the racial balance at two schools in a generally segregated school system, where those quotas place the entire burden of integration on blacks and none on whites.

THE PRIOR PROCEEDINGS IN THIS COURT AND THEIR AFTERMATH

On July 2, 1980, this Court granted *certiorari* in No. 79-1356, 100 S.Ct. 3055, to review the Court of Appeals' approval of the ceiling on minority enrollments imposed by respondents at Morgan Park and Gage Park High Schools. 604 F.2d 504 (7th Cir. 1979).

On October 1, 1980, after petitioners had filed their brief on the merits in this Court, respondent Chicago Board of Education announced that the racial quota plan under challenge "is hereby discontinued, effective at the close of the 1980-81 school year." This action was claimed to be "taken based upon the consent decree in *United States* v. *Board of Education of the City of Chicago,*" No. 80 C 5124 (Suggestion of Mootness, at A-18). The Board immediately thereafter filed a Suggestion of Mootness in the Supreme Court, contending that (1) because the plans were abandoned, "petitioners have received all they demanded" and the case was moot (Suggestion of Mootness at 3); (2) "there is no reasonable expectation" that the Board would repeat its alleged wrong, because it "is bound by judicial decree to implement a systemwide desegregation plan next Fall, and therefore it is precluded from reinstituting an admissions policy under which quotas are employed only at Gage Park and Morgan Park" (*id.* at 4); and (3) that the existence of a system-wide plan to be adopted in the Fall would modify the focus of plaintiffs' challenge and render the case no longer ripe for review (*id.* at 5). The Suggestion of Mootness was opposed both by petitioners and by *amicus* Department of Justice.

On October 20, 1980, this Court vacated this Court's judgment and remanded the case for further consideration "in light of the subsequent developments" described in

the parties' briefs on the mootness point. 101 S.Ct. 339.* On January 14, 1981, the Court of Appeals for the Seventh Circuit in turn remanded the case to the District Court (App. 67-68).

On April 15, 1981, while the case was pending in the District Court, the Board announced it was readopting the very Morgan Park and Gage Park quotas it had purported to abandon after *certiorari* was granted. (Board Report No. 81-103-12, Motion for Declaration of Non-Mootness, R.3, Vol. IV, at 1-2, Ex. C). This occurred on the same day as the Board's rejection of a city-wide desegregation plan proposed by its consultants, which would have provided various mandatory measures to implement the consent decree. (*Id.* at 2).

On April 29, 1981, the Board purported to adopt a "plan" to implement the city-wide consent decree. Under this plan, all desegregation efforts in the 1981-82 school year were to be voluntary and bus transportation was to be "considered," but not implemented, through June, 1983. No other children in the entire Chicago public school system were to be excluded from their neighborhood schools by mandatory quotas like those at Morgan Park and Gage Park. (*Id.*, Ex. D).

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* This Court's order provided:
"The judgment of the United States Court of Appeals for the Seventh Circuit is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of the subsequent developments described in the suggestion of mootness filed by respondents on October 2, 1980; the response of petitioners filed on October 10, 1980; the response of the United States as amicus curiae filed on October 10, 1980; and the reply filed on October 15, 1980."

On June 11, 1981, petitioners presented a "Motion for Declaration of Non-Mootness and for Entry of an Injunction" to the District Court (R.3, Vol. IV). This Motion recited the foregoing facts, and attached documents evidencing the readoption of the Morgan Park and Gage Park exclusionary plans and the Board's April 29 "plan" pursuant to the consent decree. (*Id.*, Ex. A-D). The District Court entered a finding that the Board had readopted the quota plans, and that the case accordingly was not moot (App. 40). However, it declined to enjoin the quota plans, and reaffirmed its December 30, 1977 order upholding those plans as modified (*id.*).*

The Court of Appeals, after granting expedited consideration, affirmed the finding of non-mootness. It held that neither of the criteria for mootness articulated in *County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979), were satisfied. The Court of Appeals noted (1) that "there remains a reasonable likelihood" that racial quotas "may again be used to exclude only blacks from Morgan Park and Gage Park High Schools despite the consent decree" (App. 5) and (2) that interim events have not "irrevocably eradicated the effects of the alleged violation" because "Plaintiffs and other black students have been excluded, and continue to be excluded, from their neighborhood

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* The Board did not object to the entry of the finding of non-mootness, either in writing or orally at the hearing. See Transcript, June 11, 1981. The Board sought only to supplement the record "for purposes of appeal," apparently to introduce evidence about what the Board intended to do with respect to the rest of the school system so that could be contrasted to the Morgan Park and Gage Park quotas. (*Id.* at 6-7). The Board did not make a formal offer of proof of the materials which it sought to place in the record, but incorporated them in an Appendix and Supplemental Appendix filed in the Court of Appeals. The Board's oral motion was denied by the District Court (A-34).

school solely on the basis of their race." (App. 7). The Court of Appeals concluded, "Because the effects of the alleged violation continue despite the consent decree and any present implementation of the decree, the controversy cannot be deemed moot." (App. 8).

The Court of Appeals declined, however, to readdress the merits, finding itself bound by the prior decision of a different panel as the law of the case.* (App. 9).

This petition for *certiorari* was filed shortly thereafter.

THE BACKGROUND OF THE QUOTA PLANS

Public schools in the City of Chicago are principally organized on a neighborhood basis, and exhibit a pattern of substantial segregation. In 1976, for example, 79% of Chicago's public elementary schools and 67% of its public high schools had student bodies which were more than 85% majority or minority (Pl. Ex. 2).

The ceilings on minority enrollment involved in this case were adopted at two public high schools on Chicago's far south side—Gage Park High School and Morgan Park High School. The attendance areas for these schools are generally speaking located between the all-black inner city schools to the east, and predominantly white schools to the west. (Pl. Exs. 2, 36).** Although racial quotas are ap-

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* The majority was careful to note, "We express no view, as an original proposition, of the merits of this controversy." (App. 10). Judge Cudahy's concurring opinion noted that he "would have difficulty, under the Fourteenth Amendment, approving even well-intended measures which tend to exclude or stigmatize a racial minority," but that he felt bound by the prior opinion. (*Id.*).

** These white schools are Kelly (78.1% white in 1976), Kennedy 89% white), Bogan (97.4% white), Hubbard (93.4% white), and Curie (76% white) (Pl. Ex. 2).

plied to certain special "magnet" schools which are not operated on a neighborhood basis, black children living in the Morgan Park and Gage Park areas are the *only* children in the City of Chicago excluded from their neighborhood schools on account of their race. (*Johnson*, R.9, ¶18 at 10-11).

The racial quota for Gage Park High School was adopted by respondents in May, 1975, and established at 48% black, 42% white, 8% Hispanic and 2% "principal's option" school-wide quota for the school. The Morgan Park quota, adopted the following year, established a 50% black—50% white quota for each entering class. The quotas were adopted over the express and determined opposition of the black community (Pl. Ex. 74 at 40-42, 44-47) (Morgan Park), and the specific ratios were selected at the urging of the white community. (Def. Ex. 35, at 29, 37) (Gage Park). In each case, the Board's *stated* purpose for the quota was to reduce overcrowding and prevent increasingly black enrollments. (App. 47, ¶12). As the District Court explicitly found, the ceiling on black enrollments was necessarily set at a lower level than that at which blacks would have been admitted but for the quotas. (App. 47, ¶12). The quotas were thus designed for the express purpose of excluding black children from Morgan Park and Gage Park High Schools.

The quotas had their intended effect. In the first three years alone, over 1630 black children were excluded, and not a single white child. (App. 58, ¶42).* In fact, the ad-

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* To date, over 3700 black children have been excluded from the two schools, with approximately 500 black children being excluded each year. (Def. App., Ct. of App., at A-71; Def. Supp. App., Ct. of App. at A-3, A-5, A-7 and A-9).

mission of every white child was apparent from the moment the quota results were first announced. (App. 47-49, App. 56). The quota plans also achieved their objective of attaining the prescribed quota levels, since increasing numbers of black children were excluded each year until the quota levels were satisfied. (See App. 50-51, ¶26). However, there was no evidence that the plans were effective in reversing the decline in white enrollment at the two schools. To the contrary, from 1975 to 1977, the white enrollment at Gage Park fell from 1034 to 881 and that at Morgan Park fell from 1262 to 1071. (Compare Pl. Ex. 1 with App. 50-51, ¶26). By 1980, white enrollments fell even further—to 663 at Gage Park and to 771 at Morgan Park (Defendants' Appendix, Court of Appeals, at A-70).

At the same time, the quotas resulted in an effective denial of an integrated education to the excluded black children. When the plans were originally adopted, the Board provided that excluded black children could attend any one of a list of so-called "under-utilized" public high schools, via public transportation. (App. 50, ¶24). The only underutilized schools with significant white enrollments were located on the north side of Chicago, at least 11.4 miles from Gage Park and 18 miles from Morgan Park. (App. 52, ¶28). As a result, virtually all the black children excluded from Morgan Park or Gage Park High Schools in 1975 and 1976 attended schools which were all or predominantly minority, and not a single child attended any underutilized white school made available by the Board. (App. 52-55, ¶¶30-32). The Board's indifference as to excluded black children's ability to obtain an integrated education is underlined by its failure even to investigate whether excluded black children were attending integrated schools. (R.16, ¶1(d) at 2; R.25, Ex. 2).

THE ORIGINAL ACTION BELOW

Petitioners are black elementary and high school students who reside in the Morgan Park or Gage Park attendance areas. They brought the action below under the Fourteenth Amendment, 20 U.S.C. §1703(c) and 42 U.S.C. §§1981, 1983 seeking an injunction against the quota plans and damages.

This case was presented to the trial judge for decision on an entirely documentary record. No Board member or representative testified as to the rationale for the quotas, and no demographer testified as to either past patterns or future projections of racial change. The sole evidence in support of the quotas was statistics showing past racial change in Gage Park and Morgan Park and in three other schools, Fenger, Orr, and Bowen. (*E.g.*, App. 31). But the Record also contains evidence that nearby schools like Kenwood remained constant from 1970-76 at 26% white (Pl. Exs. 2, 50) and absolutely no explanation of why Gage Park and Morgan Park were more like Fenger than Kenwood.* There was also no evidence that the quotas would be effective in preventing the decline in white enrollments; in fact, white enrollments at each school exhibit a precipitous decline despite adoption of the quotas. (Pl. Ex. 1; Def.

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* The Record also shows that some of the "under-utilized" schools made available to excluded black students *themselves* exhibited rapid change during this period (Lakeview went from 64.2% white to 43.6% white and Senn from 61.5% white to 44.0% white. Pl. Ex. 2, 50)— but contains no explanation of why a board purportedly intending to prevent racial change chose to bus excluded black students to schools already undergoing racial change. And nothing in the Record explains racial change in particular neighborhoods in the context of overall enrollment patterns in Chicago in which the white percentage dropped from 34.6% to 24.9% between 1970 and 1976. (*Id.*).

App., Ct. of App., at A-70). In short, on the critical points of the need for the quotas, their rationality, and anticipated efficacy, there was little more in the Record than the *ipse dixit* of the Board.

Upon submission of all the evidence, the District Court announced that it was prepared to find the quota plans unconstitutional, but would reserve ruling pending any modification the Board might seek to propose. The Board thereafter modified the plans to provide free bus transportation for excluded black children to predominantly white or integrated schools principally on the north side of Chicago. This option involved a 1½ hour bus trip each way. (R.71, Beverly Review, September 14, 1977). In 1977, only 102 of the 1632 excluded children availed themselves of that option (App. 58, ¶42). In 1978, after the exclusion of several hundred additional children, the Board reported that 359 students were participating in the busing program (App. 24). Reports by the Board for the 1979 school year indicate that after another year of exclusion, the number of black children availing themselves of the busing option has dropped to 285.*

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* Chicago Board of Education, "Access to Excellence, Summary of Continuing Programs," Jan. 31, 1980, at 5. In April, 1981, while the case was pending in the District Court for consideration of the mootness question, the Board announced it would allow some Morgan Park and Gage Park students in the 1981-82 school year to attend four South-Side predominantly white schools. (Def. App., Ct. of App. at A-71). In August, 1981, prior to oral argument in the Court of Appeals, the Board also changed the Gage Park boundaries to make it the neighborhood school for the graduates of two largely white elementary schools. This was done "to increase the white membership at Gage Park High School," in light of the quota plan's failure to attract whites to Gage Park and the resulting rapid decline in Gage Park's white enrollment. (Def. App., Ct. of

(footnote continued)

The District Court held that although the original quota plans were unconstitutional, the post-trial modifications adopted by the Board cured any constitutional defects. (App. 59, ¶¶2-5). The District Court also found that these modifications to the quota plan "would not have been adopted but for the efforts of plaintiffs and their counsel" (App. 59-60, ¶6).*

The Court of Appeals affirmed in all respects. It began by noting that, as a racial classification, the quotas would be subject to the compelling state interest test, even though they were purportedly adopted for the benign purpose of preserving integration (App. 29 n.); but that this test was satisfied because the preservation of integrated schools was *ipso facto* a compelling state interest (App. 30-31).

(footnote continued)
App., at A-87, A-95). The Court of Appeals held that these changes "do not irrevocably eradicate the effects of the alleged violation" because black children continue to be excluded from Morgan Park and Gage Park on account of their race. *Inter alia*, the schools made available to those children excluded in 1981-82 are not available to those excluded in earlier years and attending a segregated alternative school, who under the plans "are to be considered part of that school's regular student body and, therefore, are not unilaterally transferable." (R. 71, Board Report No. 77-212-16 (Revised)).

* Nevertheless, the District Court, while awarding costs to plaintiffs, denied their request for attorneys fees under 20 U.S.C. §1617 and 42 U.S.C. §1988 (App. 62) principally on the erroneous ground —not even defended by the Board on appeal—that plaintiffs' counsel was not entitled to fees because they accepted the case on a *pro bono publico* basis through the Lawyers Committee for Civil Rights Under Law (Tr., Jan. 13, 1978). The District Court also expressed "doubts" if plaintiffs "prevailed" within the meaning of the attorneys' fee statute, since they continued to urge that the plans were unconstitutional even as revised (Tr., Jan. 13, 1978).

The Court of Appeals then rejected petitioners' contention that the need for the quotas had not been established, by citing instances where rapid racial change had taken place (App. 31), and ignoring schools like Kenwood, where an enrollment of 26% white had been maintained for years. (Pl. Exs. 2, 50). It also rejected the contention that the quotas were impermissible because they were a surrender to the racial prejudice of white students disinclined to attend schools attended by large numbers of blacks ("white flight"). The Court of Appeals recognized that the quotas were designed by the Board to prevent white flight (App. 32-33), and that white flight could not be used as an excuse to avoid eradicating past discrimination (App. 31-32). It held, however, that preventing white flight was a permissible basis for a "voluntary affirmative action" program, even if it disadvantaged black children. (App. 33-34).

In the final portion of its opinion, the Court of Appeals conceded that the quotas could not be upheld if there was an alternative less burdensome on blacks. (App. 36). Petitioners, in fact, had suggested a number of such alternatives, including a broader desegregation plan and a plan involving the pairing of Gage Park and Curie, an *underutilized* school less than 2 miles away which was 76% white. (R.71, Letter of July 22, 1977). The *sole reason* the Board rejected the pairing proposal was that Curie was located in Marquette Park (an area that had witnessed racial disturbances by whites protesting against an influx of minorities), so that a pairing program allegedly "would be educationally disruptive," (Transcript, August 5, 1977, at 7-10). The Court of Appeals did not give strict scrutiny to the Board's rejection of these and other conceivably less discriminatory alternatives, but instead explicitly deferred to the Board's judgment (App. 37):

> "The appellants have advanced alternative proposals which they claim would preserve integrated student bodies at Gage Park and Morgan Park High Schools in a less discriminatory fashion. We are not persuaded, however, that these alternatives offer a viable means of preventing *de facto* segregation at these two high schools. Moreover, we regard the mechanics of integration, particularly in the circumstances of voluntary remedial action, where the purpose is obviously to implement the promise of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and effectively achieves that objective, to be ordinarily a matter within the discretion of local school authorities."

In short, the effect of the Court of Appeals decision is to defer to a school board's imposition of unique hardships on blacks, even when greater than necessary to achieve its goals, whenever the school board professes an integrative purpose.

REASONS FOR GRANTING THE WRIT

1. The Issues in this Case Are of Extreme Importance

The ceilings on minority enrollment in this case were purportedly adopted to arrest a pattern of neighborhood racial change prevalent in many cities, especially those in the north. The pattern is simple—blacks move into a neighborhood and attend the public schools, and white enrollments drop as the "white flight" phenomenon takes place. (App. 31-33). As neighborhood after neighborhood undergoes such change, overall enrollments in a city's public schools become increasingly minority.

The "solution" adopted by the Chicago Board was to place a ceiling on black enrollments in an effort to stem white flight. The surface simplicity of this approach will make it an attractive prospect for all cities with changing neighborhoods. The Court of Appeals decision will therefore have broad ramifications throughout the nation.

The problem, however, is that the Court of Appeals' decision explicitly defers to the "discretion of local school authorities" (App. 37) in placing the burdens of integration exclusively on blacks, so long as the school board invokes an integrative purpose. This deference is apparent at two crucial stages of the Court of Appeals' analysis. First, after an elaborate insistence that racial quotas purportedly designed to preserve integration must still be justified by a compelling state interest (App. 29 n.), the Court of Appeals holds that preservation of integration is *ipso facto* sufficiently compelling. (App. 30-31). This reasoning is not only circular, but it effectively precludes a searching judicial inquiry into either the *bona fides* of a racial classification or its detrimental effects. The second

example of deference is the Court of Appeals' failure to scrutinize the Board's refusal to adopt less discriminatory alternatives. (App. 37).

The dire effects of such deference by a reviewing Court are apparent in this case. For example, it is at least equally plausible—particularly given the Board's adherence to overall segregation patterns in Chicago which gave rise to the consent decree—that the prevention of racial change in Morgan Park and Gage Park was designed to preserve those communities as buffer zones between the black inner city and the predominantly white enclaves farther to the west. Indeed, this conclusion is buttressed by the Board's refusal to pair Gage Park and Curie for the sole reason that the white residents of the Curie area would resent "a large influx of minority students." (Transcript, Aug. 5, 1977 at 7-10).* Moreover, the effects of the program

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* This concern is not ameliorated by the Board's recent decision to allow some black students excluded in 1981-82 to attend four South Side predominantly white schools (which, significantly, do not include Curie). (Def. App., Ct. of App., at A-71). Instead of effecting boundary changes which enable black children to attend a white or integrated neighborhood school, the Board gave them the option of being sprinkled among several alternative schools. Coupled with the inherent uncertainties of the lottery system, this makes it far less likely that excluded blacks will elect to attend an integrated school and makes it virtually certain that there will not be "a large influx of minority students" into areas which the Board is seeking to preserve as predominantly white. In this respect, the Board's addition of the predominantly white Tonti and Sawyer Schools to the Gage Park attendance area as a result of the quota plan's failure to prevent a rapid decline of white enrollment is most instructive. For Tonti and Sawyer students, Gage Park is now their neighborhood high school, once the boundary change has been made. By contrast, while transferring the Tonti and Sawyer elementary

(footnote continued)

scarcely support a conclusion that a benign purpose is being achieved. While quota levels are being attained through the exclusion of increasing numbers of blacks annually, the flight of whites has not been stemmed. Black children alone are stigmatized as unwanted in their neighborhood school, when no other child in Chicago is so treated.* And the vast majority of excluded blacks did not obtain an integrated education, even after the Board's post-trial adoption of an optional busing program. Thus, on balance, it is scarcely apparent that the quota plans are more helpful than harmful. The problem with the Court of Appeals decision, however, is that it does not even purport to strike that balance, but merely defers to the *ipse dixit* of the Board.

As the facts in this case demonstrate, an uncritical acceptance of a stated purpose to prevent segregation as a compelling state interest (App. 30-31), and an explicit deference to the discretion of local school authorities (App. 37), will not fully protect the constitutional rights of blacks. As four Justices of this Court have noted, "any

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(footnote continued)
schools to the Gage Park district, the Board has not seen fit, for example, to transfer predominantly black schools like Libby, Bontemps, or Earle to the 80% white Hubbard High School district in which Tonti and Sawyer were previously located. Thus, black students are denied the psychological benefits of attending a school designated as their neighborhood school, *Keyes* v. *School District No. 1*, 413 U.S. 189, 245-48 (1973) (Powell, J.), and are subject to the vagaries of an arbitrary lottery and the burden of scrambling for places in the alternative schools provided by the Board.

* As this Court noted in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954) with respect to children in grade and high schools:

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

statute must be stricken that stigmatizes any group or singles out those least well represented in a political process to bear the brunt of a benign program" *University of California Regents* v. *Bakke*, 438 U.S. 265, 361 (1978) (Brennan, White, Marshall, & Blackmun, JJ.). See also *Fullilove* v. *Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J.). Thus, in the absence of a rule of law requiring strict scrutiny and a compelling state interest for *all* aspects of an explicit racial classification—the reason for the program, the basis if any for restricting the scope of the problem to be solved,* the effects of the program, and the specific reasons for not selecting less discriminatory alternatives—there can be no assurance that a political majority is not discriminating against a minority under the banner of a benign motive. And this is particularly true where, as here, the purported benign motive of preventing segregation has its origins in the racial prejudice underlying the white flight phenomenon. See *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484, 487, 490-91 (1972) (fears of white flight do not justify racial discrimination even though the school system would be 57% white and thus "integrated").

Significantly, the Court of Appeals' deference to local school authorities is most explicit at the very point that strict scrutiny is most critical—in the choice of less discriminatory alternatives. By such deference, the Court of

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* For example, it is well established that where there are general evils to be corrected, the choice of piecemeal solutions may not be made on racial grounds. *McLaughlin* v. *Florida*, 379 U.S. 184, 193-94 (1964). Thus, under a properly applied strict scrutiny test, the Board should have explained why its efforts to foster integration extended only to limiting black attendance at integrated schools, and did not include mandatory measures to integrate schools which were predominantly white. The Court of Appeals required no such explanation.

Appeals is eliminating the core of the equal protection guarantee—the assurance that blacks will not suffer deprivations which the state will not inflict on whites. The acid test is not whether a state's motive for a racial classification is laudable, but whether the state is willing to achieve its allegedly benign purposes by imposing the same burdens on whites as it imposes on blacks. All the evidence in this case suggests that the Chicago Board will not adopt any mandatory measures excluding white children from neighborhood schools in the name of integration. By contrast, the Board adopted the quotas disadvantaging blacks now for seven years over the protests of the black community (Pl. Ex. 74 at 40-42, 44-47), and without any concern—until forced to modify its plan by this litigation—for excluded black children's opportunity to attend integrated schools. This disparate treatment of whites and blacks is the antithesis of equal protection, but it is entirely overlooked in the Court of Appeals' broad deference to local authorities.

In short, the Court of Appeals' approach to this case sanctions explicit racial quotas disadvantaging blacks whenever the government invokes the talisman of integrative purpose. Such an approach falls far short of the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944), which is necessary to vindicate the purpose of the equal protection clause to protect politically disadvantaged groups. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). It would be a bitter irony if the goal of integration, which this Court extended to minorities in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), as a promise of equality, became a justification for further discrimination.

2. The Decision Below Conflicts in Principle with the Decisions of this Court and Other Circuits

The Court of Appeals decision, moreover, conflicts with the two leading cases in this Court dealing with affirmative action quotas—*Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978).

In *Fullilove*, some Justices would have found the racial quota unconstitutional because the equal protection clause "absolutely prohibits invidious discrimination by government." *Id.* at 523, (Stewart, J., joined by Rehnquist, J.). This case is *a fortiori*. Other Justices voted to uphold the *Fullilove* quota in part because they found the strict scrutiny test inapplicable to "racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination." *Id.* at 518 (Marshall, J., joined by Brennan and Blackmun, JJ.). But even these Justices recognized that anti-black classifications were to be overturned under traditional strict scrutiny review. "[A]ny statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Id.* at 519. Thus, the fact that the quotas here disadvantage blacks rather than whites is itself sufficient for their invalidation.

In addition, *Fullilove* teaches that the quotas here are invalid because they do not purport to cure past discrimination. At best, these quotas are designed to prevent a future situation which would result, if at all, from the voluntary and lawful acts of private individuals. Since the Japanese cases (*Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayshi* v. *United States*, 320 U.S. 81 (1943)), this Court has never sanctioned a present dis-

crimination against anyone—black or white—except when designed in some fashion to remedy past discrimination. *See, e.g., Fullilove* v. *Klutznick, supra,* 448 U.S. at 482-84 (Burger, C.J.) (Congressionally-mandated racial preference adversely affecting whites justified as attempt to cure the effects of past discrimination).

Indeed, certain Justices have required an even higher standard of justification—the existence of a past constitutional or statutory violation. See *Fullilove* v. *Klutznick, supra,* 448 U.S. at 497 (Powell, J.) ("But this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations"); *id.* at 528 (Stewart, J.) ("And a judicial decree that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination."). Imposition of a present disadvantage, particularly upon whites, to remedy the effects of past discrimination against blacks may be justified as a remedial program. But present discrimination, especially against blacks, is not justified by the possibility of future segregation which would result, if at all, from demographic changes rather than from past discrimination. *Cf. Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 434-37 (1976).* Indeed,

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* *Fullilove* also undermines the Court of Appeals' suggestion that the quotas here are permissible because they do not totally deprive plaintiffs of an education. See 604 F.2d at 518. This suggestion was based on dictum by Justice Powell in *Bakke,* 438 U.S. at 300 n.39, in which no other Justice joined. In *Fullilove,* however, Justice Powell indicated that even the denial on account of race of "a benefit to which a recipient is not legally entitled" is unlawful. 448 U.S. at 515 at n.13. Thus, the fact that plaintiff can obtain an alternative education elsewhere does not justify the disproportionate denial of the benefits of a neighborhood school or the resulting dis-

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the best that can be said for these quotas is that they seek to prevent the effects of racial discrimination by whites, who would refuse to attend school with a large number of blacks. The only ones who bear the burden of this discrimination, however, are black children. *Fullilove* makes clear that such a program can scarcely be justified as remedial, and accordingly demonstrates that the quotas are unlawful.

The same conclusion is apparent from the opinions of the individual Justices in *Bakke*. The *very purpose* of the Chicago quotas "is to assure within [a] student body some specified percentage of a particular group merely because of its race," and is thus "discrimination for its own sake" and "facially invalid." 438 U.S. at 307 (Powell, J.). And the quotas, unlike others approved by this Court, were not adopted in response to any "judicial, legislative, or administrative finding of constitutional or statutory violations." *Id.* The quotas here, moreover, suffer from all the infirmities which the *Bakke* quotas were said not to have—the quotas here harm a class with the "traditional indicia of suspectness," *id.* at 357 (Brennan, White, Marshall and Blackmun, JJ.); they are not designed either to "remove the disparate racial impact" of past government actions or to cure "the product of past discrimination," *id.* at 369; they "operate to stigmatize or single out [a] discrete and insular" minority group, *id.* at 374; they

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(footnote continued)

proportionate imposition of burdens. In short, Justice Powell was scarcely suggesting in *Bakke* that disproportionate treatment of the races is permissible as long as there is no "total denial." Rather, he was noting that even in an effort to remedy past discrimination —as "in compliance with a desegregation decree"—a total deprivation of an education is not justified. But here, where the quotas do not purport to cure past discrimination, the "total deprivation" standard is entirely irrelevant.

relegate excluded children to other schools which, in a neighborhood school system, creates "a significant likelihood that they will be treated as second-class citizens because of their color," *id.* at 375; and they "establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." *Id.* And finally, §601 of the 1964 Civil Rights Act, 42 U.S.C. §2000d, is not only itself applicable to the quotas here, but similar reasoning applies to invalidate the quotas under 42 U.S.C. §§1981, 1983 and 20 U.S.C. §1703(c). See 438 U.S. at 412-18 (Stevens, J.). Thus, the Court of Appeals decision also conflicts with *Bakke* and the reasoning of the Justices reflected therein.

It also conflicts with a long line of cases in other circuits which hold it impermissible to impose a disproportionate burden of integration on blacks. *E.g., Arvizu* v. *Waco Independent School District,* 495 F.2d 499, 504-07 (5th Cir. 1974) (and cases there cited) ("it is incumbent upon district courts to insure that the burdens of desegregation are distributed equitably"); *Clark* v. *Board of Education,* 449 F.2d 493, 499 (8th Cir. 1971), *cert. denied,* 405 U.S. 936 (1972) ("the burden on all students, black and white, should be as equitable as possible"); *Lee* v. *Macon County Board of Education,* 448 F.2d 746, 753-54 (5th Cir. 1971); *Moss* v. *Stamford Board of Education,* 350 F.Supp. 879 (D.Conn. 1972); *Brice* v. *Landis,* 314 F.Supp. 974, 976-78 (N.D.Cal. 1969). See also *Haney* v. *County Board of Education,* 429 F.2d 364, 371-72 (8th Cir. 1970). And fear of "white flight" is not a sufficient explanation for imposition of an excessive burden on blacks. *E.g., Lee, supra,* 448 F.2d at 754.

The Court of Appeals' opinion also conflicts, specifically, with the holding in *NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1052 (6th Cir.), *cert. denied,* 434 U.S. 997 (1977), *aff'g,* 429 F. Supp. 583, 620-21 (W.D. Mich.

1976) that a "one-way bussing" program which transported blacks but allowed whites to remain in their neighborhood school, "without a corresponding effort to spread the burdens of integration more equitably through the system, is an act of *de jure* segregation." And the quotas here, unlike the plans addressed in several cases cited by the Court of Appeals (A-22 to A-23), were not even adopted as part of an effort to eradicate segregation on a system-wide basis,* and even today, impose burdens on blacks which are in stark contrast to the Board's refusal to impose similar burdens on whites to implement the consent decree's objectives.

Thus, while purporting to adhere to the strict scrutiny standards applicable to explicit racial classifications, the Court of Appeals in fact accepted the mere recitation of a benign purpose as an automatic shield for a quota disadvantaging blacks. It thus placed the burden of proving

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* The same point disposes of the Court of Appeals' reliance on this Court's dictum in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), that a school board may adopt a voluntary plan to promote integration. In *Swann*, this Court carefully noted that such a program would be permissible where "each school" in the district would reflect the district-wide racial make-up. Here, the quotas were not adopted as part of an effort to desegregate an entire system, and the racial balance they are seeking to preserve at two schools is virtually twice the 25% white enrollment of the system as a whole (Pl. Ex. 2) and far above the 30% white enrollment which the Board defines as "stably integrated" under the consent decree (R.3, Vol. IV, Ex. D, ¶1). To preserve some schools as 50% white in such a setting necessarily means that the remaining schools will have disproportionately black enrollments. And the failure to eradicate segregation on a system-wide basis raises the danger, amply present here, that a school board's selective efforts are an attempt to disadvantage blacks under the guise of benign objectives.

the absence of less discriminatory alternatives on plaintiffs rather than on the Board by explicitly deferring to the "discretion of local school officials" (App. 37). In peremptory fashion, it dismissed the viability of other alternatives, including the suggestion for a pairing of Gage Park and Curie which the Board had rejected for the sole reason that it would discomfit the white residents of Marquette Park. (Transcript, August 5, 1977, at 7-10). In short, the Court of Appeals decision is inconsistent with the standards articulated by this Court and other Circuits to test racial classifications, particularly those adversely affecting blacks.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

Opinion of the Court of Appeals after Remand

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 81-1965, 81-2001

KATHY SUE JOHNSON, et al.,

Plaintiffs-Appellants, Cross-Appellees,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 0995—Hubert L. Will, *Judge.*

Argued September 15, 1981—Decided November 24, 1981

Before PELL, *Circuit Judge,* FAIRCHILD, *Senior Circuit Judge,* and CUDAHY, *Circuit Judge.*

PELL, *Circuit Judge.* The present appeals arise from a determination by the district court that the controversy

in these cases had not become moot by virtue of a consent decree between the United States Department of Justice and the Chicago Board of Education (the "Board") in other litigation.[1] These cases challenge the constitutionality of student assignment plans based on racial quotas which were originally adopted and implemented by the Board in 1976 for Gage Park and Morgan Park High Schools. The gravamen of the complaint is that the Board's voluntary racial quotas on enrollment have the discriminatory effect of requiring only black children to be transported from their neighborhood schools. Separate quotas for enrollment of blacks and whites were set as ceilings on the number of black children and the number of white children which could be admitted to these two schools. The purpose of these quotas, according to the Board, is to curb a trend of decreasing white enrollment and increasing black enrollment in these schools which might eventually result in two predominantly black, segregated schools.[2] Because the quotas for enrollment of blacks were set at a lower percentage level than that at which black students ordinarily would have applied and been admitted, the effect of the quotas was to exclude some blacks from admission to these schools. The quotas applicable to white students did not have this effect.

In response to the plaintiffs' motion for a permanent injunction against use of the quotas, the district court and

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[1] *United States* v. *Board of Education of the City of Chicago*, No. 80 C 5124 (N.D. Ill., filed Sept. 24, 1980).

[2] For further elaboration on the factual background of this case, see this court's prior opinion in *Johnson* v. *Board of Education of the City of Chicago*, 604 F.2d 504 (7th Cir. 1979). Although quotas were established for Hispanics as well, only the quotas for blacks were challenged by the plaintiffs in these cases. The plaintiffs are black children and their parents residing in the Gage Park and Morgan Park High Schools attendance areas.

this court on appeal upheld as constitutional the Board's use of the quotas. After the Supreme Court had granted certiorari, the Board and the Department of Justice in other litigation entered into a consent decree to develop a system-wide integration plan. At approximately the same time, the Board voluntarily discontinued use of the challenged quotas. The Supreme Court remanded to this court, and, in turn, this court remanded to the district court for a determination as to whether the consent decree or any plan implementing the decree had mooted the controversy.

The district court determined that the case was not moot because the Board had readopted the racial quotas in question after remand by the Supreme Court. In keeping with its original judgment upholding the constitutionality of the quotas, the district court again denied plaintiffs' motion for a permanent injunction against use of the quotas. Accordingly, the issue now before this court is whether the consent decree or any implementation of the decree moots the plaintiffs' case despite continued use of the contested racial quotas by the Board. If the controversy is not deemed moot, an issue remains as to the proper course of action by this court in reviewing the district court's denial of the plaintiffs' motion for a permanent injunction against use of the quotas.

I.

The consent decree compels the Board to "develop and implement a system-wide plan to remedy the present effects of past segregation of Black and Hispanic students." Two of the "Basic Objectives" of the plan to be implemented by the Board are to "provide for the establishment of the greatest practicable number of stably desegregated schools" and to "ensure that the burdens of desegregation are not imposed arbitrarily on any racial or ethnic group." Nothing in the consent decree otherwise prohibits or mandates use of racial quotas for enrollment. After entering

into the consent decree, the Board announced on October 1, 1980 that the challenged quota plan would be discontinued at the end of the 1980-81 school year. As previously noted, the sequel to this action was that the case was returned to the district court.

In April of 1981 the Board voted to reinstate the quota plans at Gage Park and Morgan Park High Schools for the 1981-82 school year. On April 29 the Board adopted a set of "Student Assignment Principles" for its integration plan pursuant to the consent decree. Under these principles, all integration efforts in the 1981-82 school year were to be voluntary, and mandatory busing of students would not be implemented until June of 1983 "to the extent that other techniques have been determined by the Board to be insufficient."

In the June 11, 1981, district court hearing on the plaintiffs' motion for a declaration of non-mootness and for entry of an injunction, the Board sought to introduce further evidence as to how the quotas were then being implemented at Morgan Park and Gage Park High Schools. The court denied the motion, reasoning that there was no need for the Board to introduce any evidence to the court in support of a position which the district court had upheld already in its prior opinion. The court heard no evidence on the current implementation of the plan beyond that already in the record. On appeal to this court, the Board stated in its brief that new feeder patterns and attendance areas adopted by the Board on August 10, 1981, were designed to remedy the prior exclusion of only black children from the two high schools. For the reasons stated herein, we need not address the issues of whether the Board's motion was properly denied or whether evidence of the Board's August 10 actions was properly part of the record on appeal before this court.

II.

A case or controversy may become moot because there is no reasonable expectation that the alleged violation will recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *County of Los Angeles* v. *Davis,* 440 U.S. 625 (1979). Both conditions must be satisfied before a case may be deemed moot. *Id.* In *Davis,* the Supreme Court concluded that the civil rights action before it was moot because the defendants had fully complied with the district court's remedial hiring order after discontinuing discriminatory tests, and there was no reasonable expectation that the defendants would ever again use the tests. The facts of the present case, however, differ sharply from those in *Davis* and fail to satisfy either condition for a determination of mootness.

The first condition for mootness under *Davis* is that there must not be any reasonable expectation that the alleged violation will recur. *County of Los Angeles* v. *Davis,* 440 U.S. 625 (1979). Even assuming that the newly adopted feeder patterns and attendance areas would and do eradicate the allegedly discriminatory effect of the quotas, as the Board contends, the controversy would not be moot if there is a reasonable expectation that the quotas may again be used to exclude only blacks. There is no question that racial quotas as such may be used by the Board despite the consent decree. As the Board concedes, it reinstituted the racial quotas shortly after entering into the consent decree and continues to use them. The only remaining determination as to the likelihood of recurrence of the challenged act is a determination of whether the consent decree precludes use of the quotas at Morgan Park and Gage Park High Schools in such a way as to exclude only blacks from those schools.

The Board's only argument against the likelihood of recurrence of the alleged violation is that the Board must comply with the consent decree, and the decree requires that the burdens of integration "not be imposed arbitrarily on any racial or ethnic group." However, the alleged violation is not the arbitrary allocation of burdens in the system as a whole, but the arbitrary allocation of the burdens of integration as to Morgan Park and Gage Park High Schools specifically. The consent decree is not addressed to those schools alone but to the city system as a whole. It requires only that the Board develop a system-wide plan to make a fair allocation of the burdens of integration. We cannot conclude that a requirement that the burdens not be imposed "arbitrarily" on any racial group for the system as a whole by its terms precludes use of quotas at Morgan Park and Gage Park to exclude only blacks from those schools.

Significantly, the Board does not take the position that such use of the quotas would violate the consent decree or even that the consent decree may preclude such use of the quotas. To do so, the Board would be placed in the anomalous position of arguing that its present enrollment plan at Morgan Park and Gage Park violates the consent decree. As the statistics on "white flight" fluctuate, the Board may again, if it is not doing so now, resort to the quotas to exclude only blacks from these schools to preserve integration despite the consent decree. Mere voluntary cessation of the challenged act cannot moot a controversy. *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953); *Chicago and Northwestern Transportation Co.* v. *United Transportation Union*, 656 F.2d 274 (7th Cir. 1981); *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975). Thus, there remains a reasonable likelihood that the quotas in question may again be used to exclude only blacks from Morgan Park and Gage Park High Schools despite the consent decree.

Our conclusion on the likelihood of recurrence of the challenged act pretermits the need for evaluating the district court's denial of the Board's motion to introduce further evidence on current implementation of the decree. On the record before us, however, we conclude that the present case is not moot as well under the second condition for mootness under *Davis*, the requirement that the interim relief or events must have irrevocably eradicated the effects of the alleged violation. Plaintiffs and other black students have been excluded, and continue to be excluded, from their neighborhood schools, solely on the basis of their race pursuant to the challenged quotas.

The Board asserts that the controversy is moot because the Board has adopted new feeder patterns and attendance areas pursuant to the consent decree so that the quotas no longer have the discriminatory effect challenged by the plaintiffs. The plaintiffs, on the other hand, contend that the Board has reimplemented the quotas at the schools in exactly the same manner and with the same results as in 1976. They assert, and the district court agreed, that at present there is no city-wide plan in effect pursuant to the consent decree.

Although further elaboration in the district court as to current feeder patterns and attendance areas would have been useful on this point, we conclude that the plaintiffs and other black students continue to be excluded from their neighborhood schools solely on the basis of their race. The Board's adoption of allegedly non-discriminatory feeder patterns and attendance areas on August 10, 1981, cannot moot the controversy if they have not actually been implemented and do not irrevocably eradicate the effects of the alleged violation. Noticeably, the Board does not contend that the plaintiffs and other black students are not currently being excluded from their neighborhood schools

solely on the basis of their race just as they were under the original 1976 plans. Instead, the Board states merely that black students excluded from Morgan Park and Gage Park High Schools now have a "viable opportunity to obtain an integrated education at a nearby school. . . ." Because the effects of the alleged violation continue despite the consent decree and any present implementation of the decree, the controversy cannot be deemed moot.

III.

Having determined that the controversy is not moot, this court reinstates its prior judgment and opinion in *Johnson* v. *Board of Education of the City of Chicago*, 604 F.2d 504 (7th Cir. 1979), to uphold the district court's denial of an injunction against use of the quotas at Morgan Park and Gage Park High Schools. When a federal court of appeals has decided an issue in a case, the court's ruling establishes law which it itself should apply to the same issues in subsequent proceedings in that case absent "unusual and compelling circumstances." *United States* v. *Hoffa*, 436 F.2d 1243, 1248 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); *United States* v. *Hoffa*, 402 F.2d 380, 387 (7th Cir. 1968), *vacated and remanded on other grounds*, 394 U.S. 310 (1969).

The most significant Supreme Court opinion bearing on the issues decided by this court since our prior opinion in this case is *Fullilove* v. *Klutznick*, 448 U.S. 488 (1980). In *Fullilove*, the Supreme Court upheld the use of explicit racial quotas setting aside 10% of all federal contracts for "minority business enterprises" in the Public Works Employment Act of 1977. Whatever view we might have of the merits of this controversy as a matter of first impression, we conclude that *Fullilove* does not so clearly conflict with the ruling by this court in its prior opinion

as to constitute "unusual and compelling circumstances" warranting a departure from the law of the case. Specifically, the result in *Fullilove* does not conflict with this court's determination in *Johnson* that the use of racial quotas is constitutional in remedial programs designed to remedy the lingering effects of past discrimination.

To justify departure from our prior decision, the plaintiffs have submitted in their brief that recent statistics demonstrate that "white flight" continues to accelerate despite the quotas. Such statistics, however, are a two-edged sword. Statistics of increasing "white flight" also tend to confirm the original concerns upon which the Board's actions were predicated. The prior decision in *Johnson* affirmed in principle the legitimacy of taking "white flight" into account in a school board's voluntary implementation of desegregation efforts. Because statistics of increasing "white flight" cannot be said to invalidate this underpinning of the prior decision, we consider ourselves bound by the prior decision.

Our prior decision also continues to govern the issue of an award of attorney's fees in this case. *Johnson* v. *Board of Education of the City of Chicago*, 604 F.2d 504, 519 (7th Cir. 1979). As we said in *Johnson*, it was not an abuse of discretion for the district court to deny an award of attorney's fees to the plaintiffs under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, and under the Emergency School Aid Act, 20 U.S.C. §§ 3191 *et seq.*,[3] because the plaintiffs have not been awarded the relief sought in their complaint.

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[3] The provision for attorney's fees under the Emergency School Aid Act, 20 U.S.C. § 1617, upon which this court's prior decision was based, was repealed effective one month after our decision and recodified without substantive change in 20 U.S.C. § 3205.

Accordingly, for the aforementioned reasons, the judgment of the district court of non-mootness is affirmed. We express no view, as an original proposition, of the merits of this controversy. Whatever view of the merits this panel might have as an original proposition, we are unable to find "unusual and compelling circumstances" to warrant our departure from the law of the case established in the prior opinion. Therefore, we consider ourselves bound to and do reinstate the prior opinion in this case to uphold the district court's denial of plaintiff's motion for an injunction and its denial of attorney's fees to the plaintiffs. The parties shall bear their own costs on appeal.

AFFIRMED.

CUDAHY, *Circuit Judge,* concurring:

I think it important that Judge Pell's excellent opinion for the court expresses no view, as an original proposition, of the merits of this controversy. Were this a matter of first impression, I would have difficulty, under the Fourteenth Amendment, approving even well-intended measures which tend to exclude or stigmatize a racial minority. *See Fullilove* v. *Klutznick,* 448 U.S. 488, 518 (Marshall, J., concurring in judgment) (1980). I fully agree, however, that we are bound by our prior opinion in this case.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Original Opinion of the Court of Appeals

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1215

KATHY SUE JOHNSON, etc., *et al.*, and DARCEL MILTON, etc., *et al.*,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 76-C-995, 76-C-996—HUBERT L. WILL, *Judge*.

Argued October 30, 1978—Decided August 13, 1979

Before CASTLE, *Senior Circuit Judge*, BAUER and WOOD, *Circuit Judges*.

BAUER, *Circuit Judge*. The principal issue presented by this appeal is whether the Constitution permits local school authorities to impose racial quotas on enrollments in connection with a desegregation plan voluntarily en-

acted to prevent *de facto* segregation in the public schools. Plaintiffs-appellants appeal from the order of the district court upholding the challenged desegregation plan as constitutional and enjoining the defendants-appellees to maintain and to continue the plan, as modified to provide for the voluntary busing of students excluded from admission to their neighborhood high schools to alternative integrated high schools. Appellants further appeal from the order of the district court denying their petition for attorneys fees. We affirm the judgments appealed from for the reasons set forth below.

I

These consolidated civil rights actions for declaratory judgment and injunctive relief were filed on March 15, 1976, challenging as unconstitutional a desegregation plan adopted voluntarily by the Board of Education of the City of Chicago in an effort to arrest the trend toward segregated enrollments at two Chicago public secondary schools. The challenged desegregation plan, commonly referred to as the "Student Racial Stabilization Quota Plan" ("Plan"), established a ceiling on enrollments and imposed racial quotas with respect to admissions at Morgan Park and Gage Park High Schools. Plaintiffs-appellants in *Johnson* v. *Board of Education* are black children and their parents residing in the Morgan Park High School attendance area.[1] Plaintiffs-appellants in *Milton* v. *Board of Education* are black children and their parents residing in the Gage Park High School attendance area. Plaintiffs'

[1] The term "attendance area", as used herein, refers to the geographic zone or sub-district of the Chicago public school district established by the Board of Education for Gage Park and Morgan Park High Schools. All elementary students residing within the Gage Park sub-district are eligible to attend Gage Park High School. Similarly, all elementary students residing in the Morgan Park sub-district are eligible to attend Morgan Park High School.

complaints alleged that the Plans, as instituted at Morgan Park and Gage Park High Schools, deprived them of their rights under the Constitution and under Title 42 U.S.C. §§ 1981 and 1983, and under Title 20 U.S.C. § 1703(c) because the Plans restricted the admission of minority students to these high schools solely on the basis of race.

Defendants-appellees named in these actions are the Board of Education of the City of Chicago, the individual members of the Board of Education, and Dr. Joseph P. Hannon, General Superintendent of Schools. Defendants filed answers to the complaints, denying the Plans were unconstitutional and denying plaintiffs were deprived of any rights under federal law. Defendants further alleged that plaintiffs had no constitutional right to attend Morgan Park or Gage Park High School since the Board of Education, vested by state statute with the supervision and management of the public school system of the City of Chicago, is empowered to divide the city into attendance areas and to apportion the pupils to the several schools, taking into consideration the prevention of racial segregation in the public schools. In the performance of these statutory duties, the Board contended the Plans were necessary to alleviate overcrowding and to promote integration at Morgan Park and Gage Park High Schools, both of which had experienced an accelerated change in the size and racial composition of their enrollments as a result of a concomitant demographic change in the residential neighborhoods encompassing the attendance areas of these schools.

On April 29, 1976, three days after the filing of defendants' answer, plaintiffs in *Johnson* presented a motion for a temporary restraining order seeking to enjoin the implementation of the Plan at Morgan Park High School, which was scheduled to begin the next day with a lottery drawing to select the incoming freshman class for the fall

of 1976. The district court denied the motion. On August 17, 1976, after extensive discovery by means of interrogatories and document production, plaintiffs filed a motion for a preliminary injunction or in the alternative for summary judgment. On September 27, 1976, the district court denied the alternative motion for summary judgment, but deferred ruling on plaintiffs' motion for preliminary injunction, stating its preference for a modification of the Plans to include a voluntary busing program for students excluded from these two schools to attend alternative integrated high schools.

At the conclusion of discovery, entry of a final pre-trial order, stipulation of additional facts and admission of exhibits into evidence, and after both parties agreed to withdraw objections, the parties rested on June 27, 1977. At that time, counsel for the Board advised the court of a pending modification of the Plans to be acted upon at the next Board meeting. The district court then stated it was prepared to find the Plans as originally adopted to be unconstitutional, but would reserve final ruling pending any modification the Board might wish to present.

On July 13, 1977, the Board adopted a modification of the Plans, which provided bus transportation to white or integrated schools from a convenient point near the residences of all students in the Gage Park and Morgan Park attendance areas who were not selected for admission to these two schools under the Plans. By an order of the district court entered August 12, 1977, the Board was directed to implement procedures for publicity and student counseling with respect to the Plans, as modified, and further, to provide that designated spaces at the alternative schools which were not filled by students excluded from one school (e.g., Gage Park) would be made available to students excluded from the other school (e.g., Morgan Park).

On December 30, 1977, the district court entered its findings of fact and conclusions of law, and granted judgment in favor of the defendants. The court held that the Plans, as modified to include bus transportation to primarily white or integrated schools for those students not admitted to Gage Park or Morgan Park High Schools, restored to plaintiffs their constitutional rights in that plaintiffs had a meaningful opportunity to attend a Chicago public high school in an integrated setting. The court further ordered that defendants be enjoined to continue the Plans, as modified. On January 23, 1978, the district court granted plaintiffs' petition for costs, but denied their request for attorneys fees.

Plaintiffs subsequently appealed from these adverse judgments to this Court. First, appellants contend the Plans, as modified, violate their rights secured by the equal protection clause of the Fourteenth Amendment. Second, appellants contend that the district court erred in denying their request for attorneys fees.

II

Before addressing the merits of the appellants' contentions, however, it is necessary to explicate in appropriate detail the development and implementation of the challenged desegration plan, as supported by the record before this Court.

Gage Park and Morgan Park High Schools Prior to the Adoption of the Plans

Gage Park High School, 5630 South Rockwell Avenue (2600 West), Chicago, and Morgan Park High School, 1744 West Pryor Avenue (11200 South), are public high schools owned and operated by the Board of Education of the City of Chicago. But for the Board's Plans, freez-

ing enrollment and establishing racial quotas with respect to admissions at these two high schools, all eighth grade students residing in the Gage Park or Morgan Park attendance areas would have been offered the opportunity to attend Gage Park or Morgan Park High School. In 1975, Gage Park High School was approximately 41% white and 59% nonwhite, while Morgan Park was 37% white and 63% nonwhite. The comparable figures for 1976 are 42% white and 58% nonwhite for Gage Park, and 38% white and 62% nonwhite for Morgan Park. As the district court found, students enrolled at Gage Park and Morgan Park are thus attending school in an integrated setting.

The district court also found that the residential neighborhoods encompassing attendance areas for these two schools were in part undergoing an accelerated racial change from white to black in the period immediately preceding the implementation of the Plans, which began in September 1975 at Gage Park High School and in September 1976 at Morgan Park High School. Both schools were also operating in excess of their permanent facility capacities because of increasing enrollments.

During the period from 1972 to 1974, black enrollment at Gage Park had increased from 1,056 to 1,361. The racial composition of all students attending public and nonpublic elementary schools in the Gage Park attendance area in 1975 was 5,235 black, 8,617 white, 1,174 Hispanic and 110 "other". As of January 30, 1976, enrollment at Gage Park High School was 2,441 and the school was operating at 106% of capacity.

During the period from 1972 to 1975, black student enrollment at Morgan Park had increased from 52.3% to 62.3% and white student enrollment had declined from 45.7% to 36.9%. In this same period, total enrollment in-

creased from 3,092 to 3,423. The racial composition of all students attending public and nonpublic elementary schools and residing in the Morgan Park attendance area in 1976 was 6,842 black, 7,312 white, and 144 "other". As of January 30, 1976, enrollment at Morgan Park High School was 3,323 and the school was operating at 128.6% of capacity of permanent facilities.

Statistics presented by the Board of Education indicated that in rapidly changing neighborhoods where no action had been undertaken by the Board segregated schools had resulted. For example, during the period from 1970-1975, white enrollment at the following Chicago public high schools declined dramatically: Fenger High School, 46.6% to 1.0%; Orr High School, 30.6% to 5.0%; Bowen High School, 36.2% to 6.6%. The Board therefore regarded the Student Racial Stabilization Plans as necessary to prevent the incidences of racial isolation which had occurred at schools situated in neighborhoods experiencing a rapid change in racial composition.

The Board's stated purpose for the adoption of the racial quotas was to prevent overcrowding and to prevent Gage Park and Morgan Park High Schools from becoming racially segregated. Consequently, the quota for the admission of black students at each school was necessarily set at a lower level than that at which black students would have applied and have been admitted but for the quota.

The Gage Park Plan

On May 14, 1975, the Board of Education of the City of Chicago adopted a Student Racial Stabilization Quota Plan establishing a ceiling on enrollment and a racial quota with respect to admissions at Gage Park High School. Under this Plan, enrollment, which had reached 2,441 and was projected at 3,100 for September 1975, would be held to a

maximum of 2,800 students with a racial composition of 48% black, 42% white, 8% Hispanic and 2% principal's option. The selection of incoming freshmen would be determined by lottery.

The first lottery, in preparation for the September 1975 academic year at Gage Park High School, was held on June 2, 1975. Under the Plan, separate lottery lists were prepared for white, black and Hispanic students and students were selected for admission in the order their names appeared on the list until the quota for their race had been filled. Thus, the group of students accepted into Gage Park for the September 1975 school year included all those names down to a red line on the lottery list for each race. The red line appeared immediately below the last name on the lottery list for white students—No. 289. By contrast, the red line appeared below name 200 on the black list, which had a total of 498 names, indicating the exclusion as of that date of 298 applicants.

Students initially denied admission were offered the opportunity to attend Gage Park High School in the event another student of the same race, previously admitted to the school, elected not to attend. Moreover, since the racial percentages were to be applicable to the school as a whole rather than to the incoming class, additional black students were to be admitted to the extent that additional white students elected to attend Gage Park so that the prescribed racial balance was maintained. Thus, within two weeks after the lottery drawing an additional 60 black elementary students who had been placed on a "waiting list" were given the option to enroll in Gage Park High School. By October 1, 1975, all of the originally excluded 498 black students had been offered the option of enrolling in Gage Park. An additional 212 black students who applied for admission after the June 2, 1975 lottery were not offered

the option of enrolling into Gage Park High School. Each of the 136 additional white students applying for admission after the June 2, 1975 lottery were offered the opportunity to enroll at Gage Park High School.

The Gage Park Plan was also applied to the freshman class entering in September 1976, with the applicable lottery drawing held on January 19, 1976. The entering class in 1976, as determined by the drawing, was 44% white (229/519), 43% black (224/519) and 12% Hispanic (61/519). A student racial/ethnic survey dated October 29, 1976, and conducted by the Board of Education, showed that the entering freshman class of September 1976 at Gage Park was in fact 42.6% white (228/535), 45.4% black (243/535), and 11.4% Hispanic (61/535).[2]

With respect to the January 1976 drawing for the school year commencing in September 1976, a red line appeared immediately below the last name on the list for white students, No. 309. By contrast, the red line appeared below name No. 300 on the black list, which contained a total of 626 names, indicating the exclusion at the time of the drawing of 326 black applicants. Thus, all 309 white students included in the January lottery and all 181 white students applying thereafter were offered the opportunity to enroll in Gage Park for September 1976. Of the 626 black students included in the lottery and the 210 additional students applying thereafter, 300 black students were permitted to enroll and 243 actually attended Gage Park High School. At least 411 black students were excluded from Gage Park High School as of October 12, 1976 as a result of the racial quota.

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[2] In 1975 and 1976, all of the freshmen attended the Gage Park High School "branch", which is on the same campus as the high school, is part of the permanent facility, and is utilized by freshmen only.

On January 21, 1977, a lottery drawing was held for the September 1977 freshman class at Gage Park High School. Of the 754 black children in the lottery drawing, 425 were accepted as enrollees and 329 were denied admission. Of the 85 Hispanic students, 35 were accepted and 50 were denied admission. Not one of the 364 white students who applied was denied admission to Gage Park High School.

The Morgan Park Plan

On March 10, 1976, the Board of Education adopted a Student Racial Stabilization Quota Plan which established a ceiling on enrollment and imposed a racial quota with respect to admissions at Morgan Park High School. Overcrowding at Morgan Park, which was operating at 128.6% of its permanent facilities capacity, was to be reduced by limiting the enrollment of incoming 9th graders to 700 students divided approximately 50% white and 50% black. Unlike Gage Park, there is no significant number of Hispanic students attending Morgan Park High School. The Morgan Park Plan differed in two other respects from that implemented at Gage Park. First, the racial quotas were applied to each entering class, rather than to the school as a whole. Second, the Morgan Park Plan provided for the admission of a maximum of 350 black students, even if less than 350 white students applied. By contrast, the Gage Park Plan admitted black students to the extent that sufficient numbers of white students were in attendance so that the requisite 48% to 42% black-to-white student ratio was maintained.

The lottery to determine the September 1976 admissions to Morgan Park High School was held on April 30, 1976. As of May 10, 1976, ten days after the drawing, all 484 white students in the lottery were offered the option to

enroll in Morgan Park. An additional white student, who apparently was never assigned a lottery number, was notified of her admission on May 11, 1976. Subsequently, 33 white students applying as transfer students were also admitted. Of the 480 black students seeking admission, 350 were offered the option to enroll in Morgan Park, indicating that 131 black students were denied admission as of that date. On or after September 27, 1976, 33 of the black students placed on the "waiting list" were offered the opportunity to enroll at Morgan Park. A number of such students, who were attending other schools at that time, declined to transfer to Morgan Park. Thus, as of October 29, 1976, 538 black and 490 nonblack students were eligible to apply for admission to the 1976 freshman class. No white student was denied admission to Morgan Park, but 126 black students were denied admission, which number included 15 transfer students. The number of students actually admitted to Morgan Park High School as freshmen in September 1976 was 350 black and 272 nonblack.

On February 3, 1977, the applicable lottery drawing was held for the September 1977 freshman class at Morgan Park High School. The eligible students included 610 whites and 612 blacks. In April 1977, each white student who wished to attend Morgan Park High School was notified of his or her admission; the total admitted was 317. At the same time, 350 black students were notified of their admission, and 157 black children who wished to attend the school were excluded.

Results of the Original Plans

At the time the Student Racial Stabilization Quota Plans were adopted there were substantially more white students than black students in public and nonpublic elementary schools in the Morgan Park and Gage Park attendance

areas. However, it became apparent after the Plans were in operation that the number of white students seeking admission at each high school was less than the quota set for white students and that the number of black and Hispanic students applying exceeded the quotas for those groups. Thus, no white student was ever denied admission as a result of the quotas instituted at Gage Park and Morgan Park High Schools, but hundreds of black and Hispanic students were denied admission to these schools annually from the inception of the Plans.

Under the Plans as originally adopted by the Board, students denied admission to Gage Park and Morgan Park High Schools were permitted to attend any "under-utilized" Chicago public high school through the Board's Permissive Transfer Program.[3] Under this Program, every child attending an over-utilized high school in the City of Chicago (which included Gage Park and Morgan Park High Schools) was given the option of attending an under-utilized school. Thus, prior to and irrespective of the Student Racial Stabilization Quota Plans, Gage Park and Morgan Park High School students could have elected to attend these under-utilized schools.

Until the Board adopted a revised voluntary transfer program, excluded students residing in the Morgan Park and Gage Park attendance areas were required to travel to alternative schools using public transportation. Carfare was provided to students excluded from Gage Park High School commencing in September or October 1976, the second year the Plan was in operation. For students ex-

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[3] "Under-utilized" was defined to mean a school with a total student enrollment below the "city-wide per cent of capacity" of 101.3%. In 1975, 22 of 51 general high schools were above the level of 101.3% utilization (excluding so-called "temporary facilities"). In 1976, 29 of 51 high schools were above that level.

cluded from Morgan Park High School carfare was provided from the inception of the Plan in September 1976.

Of the eighteen general high schools available to those denied admission as a result of the racial quotas, six have significant white enrollments and are located on the north side of the City of Chicago. None of these six predominantly white-attended schools are situated south of 4000 North and three are north of 5800 North in Chicago. By contrast, Gage Park High School is located at 5600 South and Morgan Park is located at 11200 South in Chicago. Thus, the closest of these primarily white alternative schools, Lakeveiw, is 11.4 miles from Gage Park and 18.15 miles from Morgan Park High School.

Accordingly, under the original Plans, travel to these eighteen schools from Cage Park or Morgan Park High Schools involved (1) taking a bus to the Dan Ryan rapid transit line; (2) transferring from the Dan Ryan to the Howard or Ravenswood rapid transit lines; (3) travel on the Howard or Ravenswood rapid transit lines; and in two instances (4) an additional bus trip to the school.

Of the 416 black students excluded from Gage Park High School as a result of the 1975 lottery, 306 of these students enrolled in 28 other predominantly black high schools, 11 attended 6 other schools with significant white enrollments, and data with respect to the 99 additional black students was unavailable. Of the 539 black students denied admission to Gage Park in the 1976 lottery, 471 students attended 24 alternative high schools with predominantly black enrollments, and 68 students enrolled in 6 alternative high schools with significant white enrollments.

Of the 193 black students excluded from admission to Morgan Park High School in the 1976 lottery, 191 at-

tended alternative schools whose enrollments were over 99% minority, and two students attended one school which had a significant white student enrollment.

Modification of the Plans

On July 13, 1977, the Board of Education adopted Board Report No. 77-212-6 (Revised), which modified the Gage Park and Morgan Park Student Racial Stabilization Quota Plans by providing excluded minority students the option of attending certain North side predominantly white or integrated schools by means of bus transportation provided by the Board of Education. Under the terms of the modification enacted by the Board, ten alternative white or integrated schools were made available to excluded Gage Park and Morgan Park black children, with up to 1,262 spaces designated for Gage Park transfer students and up to 390 spaces designated for Morgan Park transfer students to these schools. In addition, the modification included a publicity program concerning the Plans and a counseling service for students who participated in the Plans. These modifications were implemented immediately by the Board in order to be incorporated into the operation of the Plans for the school term beginning in September 1977.

Results of the Modified Plans

As of October 12, 1977, 102 of the 1,632 students excluded as a result of the Gage Park and Morgan Park Plans had availed themselves of the opportunity to attend one of these ten alternative high schools, utilizing 7 buses at a cost of $1,014 per day. As of October 1978, the Board reported that 359 excluded students were participating in the Plan for the 1978 school year, and attending nine of the alternative schools offered under the modified Plan.

The district court found that the Plans were attempts on the part of the Board to relieve overcrowding and to promote integration at schools situated in rapidly changing neighborhoods, and that experience had shown that the Board achieved both objectives at each high school. Thus, as a result of the modified Plans, the racial balance at Gage Park High School is 45.4% black, 41.9% white, and 12.7% "other", and the racial balance at Morgan Park is 59% black and 41% white. The enrollment at Gage Park has been reduced to 2,102 students and the school is operating at 91.3% of capacity. The Morgan Park enrollment has been reduced to 2,613 students and the school is operating at 101.2% of capacity.

III

Appellants' principal contention on appeal is that the Student Racial Stabilization Quota Plans instituted by the Board of Education at Gage Park and Morgan Park High Schools are statutorily and constitutionally infirm. We are not persuaded by the arguments advanced in support of these contentions, and accordingly conclude that the Plans, as modified, are statutorily and constitutionally permissible.

A

We begin by addressing the appellants' argument that the Illinois School Code explicitly proscribes the racial quotas challenged in this litigation.[4] It is true, as the

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[4] The Illinois statute governing the powers of the Board of Education of the City of Chicago provides, in pertinent part, as follows:

> "The board shall exercise general supervision and management of the public education and the public school system of the city, and shall have power:
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> * * * * *
>
> "7. To divide the city into sub-districts and apportion the

(footnote continued)

appellants argue, that the statute appears on its face to prohibit the Board from considering race as a basis for excluding a student from admission to a public school situated within a particular attendance area. However, it is also true that the statute empowers the Board to consider race as a basis for revising the geographic boundaries of a particular attendance area where necessary to prevent racially segregated enrollments. Indeed, we think a fair reading of the statute discloses that the central purpose of this provision was to invest the Board with sufficient discretionary authority to achieve "the prevention of segregation and the elimination of separation of children in public schools because of color, race, sex or nationality." Viewing the statute in light of this purpose, we perceive no rational basis for a statutory construction which permits the Board to prevent segregation through a racially-based redistricting plan but prohibits the Board from achieving the same end through a racially-based intradistrict transfer plan. We therefore decline to ascribe to the statute a prohibition inconsistent with its underlying purpose, and accordingly hold that the statute does not foreclose the Board from restricting the racial composition of the enrollment at a school within a particular attendance area where, as here, such a remedial measure achieves the prevention of *de facto* segregation in the pub-

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(footnote continued)

> pupils to the several schools, but no pupil shall be excluded from or segregated in any such school on account of his color, race, sex, or nationality. The board shall, as soon as practicable, and from time to time thereafter, change or revise existing sub-districts or create new sub-districts in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race, sex or nationality. . . ."

Ill. Rev. Stat. 1975, ch. 122, § 34-18, para. 7.

lic schools. *See North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 45-46 (1971).

Nor are we persuaded that the Board of Education exceeded its statutory authority in establishing racial quotas with respect to admissions at Gage Park and Morgan Park High Schools. In reviewing various integration solutions promulgated by local school boards, the Supreme Court has consistently recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley,* 418 U.S. 717, 741-742 (1974); *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1, 49 (1973); *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 469 (1972).

Moreover, it is well-settled in both federal and state law that local school boards may voluntarily adopt plans including busing to promote integration. As the Supreme Court declared in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971):

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this is within the broad discretionary powers of school authorities. . . ."

402 U.S. at 16. The Illinois Supreme Court has also recognized the authority of local school boards to undertake voluntary programs designed to remedy *de facto* segregation, as stated in *Tometz* v. *Board of Education, Waukegan City School District No. 61,* 39 Ill.2d 593, 237 N.E.2d 498 (1968):

> "State laws or administrative policies, directed toward the reduction and eventual elimination of *de facto* segregation of children in the schools and racial

> imbalance, have been approved by every high State court which has considered the issue . . . . Similarly, the Federal courts which have considered the issue . . . have recognized that *voluntary* programs of local school authorities designed to alleviate *de facto* segregation and racial imbalance in the schools are not constitutionally forbidden . . . ."

39 Ill.2d 597, 237 N.E.2d at 501 (citations omitted) (emphasis added).

In the case at bar, the Chicago Board of Education voluntarily adopted a desegregation plan designed to prevent *de facto* racial segregation at two public high schools. The record is uncontroverted that prior to the implementation of the Plans, the attendance areas for Gage Park and Morgan Park High Schools were rapidly changing in residential occupancy from white to black and the trend in enrollments was toward segregated student bodies. The district court found, based on a voluminous record, that the Plans successfully arrested this trend and concluded that, as a result of the Board's modification of the Plans, all high school students living in those attendance areas were provided with a meaningful and viable opportunity to attend an integrated high school.

Accordingly, in view of the broad statutory powers vested in the Board to formulate and to implement educational policy, including the establishment of programs designed to preserve integration in the public schools, we regard the Board's efforts to prevent *de facto* segregation as a legitimate exercise of its discretionary authority consistent with its legislative mandate and established principles of local school autonomy.

B

Of course, no state law may operate in contravention of the Constitution. School board policies and the present

laws with respect to local autonomy are not sacrosanct, and if they conflict with the Fourteenth Amendment federal courts are charged with an affirmative duty to prescribe appropriate remedies. *Milliken* v. *Bradley,* 418 U.S. 717, 744 (1973). The principal task before this Court, therefore, is to determine whether the imposition of a racial quota against the admission of minority students to particular schools, however "benign" in its objectives, violates the equal protection clause of the Fourteenth Amendment.[5]

It is well-settled that state actions which restrict fundamental rights or which distinguish between individuals solely on the basis of race are regarded as inherently suspect and subject to strict judicial scrutiny. *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 16-17 (1973). The state action challenged here, however, does not involve a fundamental right. Federal and state courts

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[5] The threshold question raised by the parties is the proper standard of judicial review. Appellants contend the racial quotas are explicit classifications based solely upon race. As such, appellants argue the Plans merit strict judicial scrutiny and accordingly cannot be justified in the absence of a compelling state interest. Appellees contend the appropriate standard of review is whether the assertedly benign discrimination attendant with the racial quotas bears a rational relationship to the legitimate governmental purpose of preventing *de facto* segregation in the public schools. We reject appellees' contention, as well as their further argument that, by characterizing the Plans as *voluntary* affirmative action, the applicable standard of review is less exacting than strict scrutiny. We regard any state action involving racial discrimination, however "benign", as requiring analysis under the strict scrutiny-compelling state interest standard. *See, e.g., University of California Regents* v. *Bakke,* 438 U.S. 265, 291 (Opinion of Powell, J.), 357 (Opinion of Brennan, White, Marshall, Blackmun, JJ.) (1978).

have uniformly rejected the contention of a constitutional right to attend a particular school. *See, e.g., McDaniel* v. *Barresi,* 402 U.S. 39 (1971); *Norwalk C.O.R.E.* v. *Norwalk Board of Education,* 423 F.2d 121 (2d Cir. 1970); *Allen* v. *Asheville City Board of Education,* 434 F.2d 902, 905 (4th Cir. 1970); *Moss* v. *Stamford Board of Education,* 356 F. Supp. 675 (D.C. Conn. 1973); *People ex rel. Altman* v. *Board of Education of the City of Chicago,* 90 Ill. App.2d 21, 30, 234 N.E.2d 362, 366 (1967); *Citizens Against Busing* v. *Palmason,* 80 Wash.2d 445, 495 P.2d 657 (1972).

But there is no question that the challenged desegregation plan rests solely upon distinctions according to race. Therefore, if the Plans are to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate, *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967), and even then, only if no less restrictive alternative is available. *See, e.g., San Antonio Independent School District* v. *Rodriguez, supra; Dunn* v. *Blumstein,* 405 U.S. 330 (1972).

Guided by these principles, we proceed to an examination of the merits of the arguments advanced by the appellants in support of their contention that the Plans are violative of the Fourteenth Amendment. First, appellants contend the Board failed to establish the requisite compelling state interest to justify the imposition of racial quotas in connection with the Plans. The record in these cases plainly refutes this contention. The Board's articulated purpose for the adoption of the Plans was the alleviation of overcrowding and the prevention of *de facto* segregation at Gage Park and Morgan Park High Schools. We find the state interest in promoting integration in these two high schools and communities, while at the same time

affording all students residing in these attendance areas a viable opportunity to attend high school in an integrated setting, to be compelling.

Second, appellants argue that the Board failed to show that the racial quotas were necessary to achieve the state interest in preventing the racial segregation of Gage Park or Morgan Park High Schools. This assertion is similarly unsupported by the record. It had been the Board's experience that, where no stabilization quota plans were instituted, schools situated in rapidly changing residential neighborhoods had become racially segregated. For example, Fenger High School, which adjoins the Morgan Park attendance area on the east, went from white enrollment of 46% to 1% during the period from 1970-1975. The Gage Park and Morgan Park attendance areas had been undergoing an accelerated change in residential occupancy from white to black and, while these high schools were still integrated at the time the Plans were instituted, their enrollments were rapidly becoming predominantly black. Accordingly, the Plans were designed to stabilize the integrated character of Gage Park and Morgan Park High Schools and to prevent their enrollment from becoming segregated. The district court found the Plans successfully arrested the segregative impact of population change in the attendance areas of these two high schools.

Thus, the legitimacy of the racial quotas imposed in connection with this voluntary desegregation plan turns upon a determination of whether the Board may properly consider the unpleasant realities of demographic change and the phenomenon of "white flight" when it seeks to preserve integration in the public schools.

It is clear that the prospect of white flight and consequent resegregation cannot justify failure to comply with a court decree ordering integration. *Monroe* v. *Board of*

Commissioners of the City of Jackson, 391 U.S. 450, 459 (1968); *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 490-491 (1972). But we regard these cases as inapposite to the factual setting in this case. Both *Monroe* and *Scotland Neck* involved resistance to a judicial order to desegregate, and the circumstances in each case revealed that the motivating concern with respect to white flight was not the preservation of integration, but the interests of white students seeking to accommodate their own prejudice—the disinclination to attend school with black students. In this case, there is no basis in the record to support the contention that the racial quotas imposed were intended to retard integration and to create racial imbalance at these two high schools. On the contrary, it is evident that the Board's voluntary action was motivated by a good faith effort to stabilize the enrollments at Gage Park and Morgan Park High Schools, and to promote integration not only at these two high schools but also at the alternative high schools designated under the Plans.

Moreover, where the existence of white flight is not used as a shield to avoid mandatory desegregation or to perpetuate segregation, federal courts have held that local school authorities may legitimately take into account the phenomenon of white flight in formulating voluntary programs designed to achieve integration. *See, e.g., Higgins* v. *Board of Education of the City of Grand Rapids*, 508 F.2d 779, 794 (6th Cir. 1974); *Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 720 (2d Cir. 1979).

Contrary to the appellants' contention, the record in these cases documents the existence of white flight from these two high schools. Although more white students than black students resided in the Morgan Park and Gage Park

attendance areas, white enrollments in these schools were declining while black enrollments were increasing. The difference between the numbers of white students eligible to enroll at these high schools and those actually admitted is attributable to the fact that white students were enrolling in parochial schools serving these attendance areas.

The Supreme Court has recognized that "substantial benefits flow to both whites and blacks from interracial association . . . ." *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 94-95 (1977), and those benefits cannot be achieved in the public schools unless a school board may consider steps to resist racial segregation. The record in these cases substantiates the emerging patterns of population change and the concomitant phenomenon of white flight in the Gage Park and Morgan Park communities. This phenomenon cannot be ignored in any meaningful effort to preserve integration at the public high schools serving these communities. The exodus of white children from the public schools would disadvantage the entire community and would imperil the success of this voluntary desegregation plan. In light of these realities, we are persuaded that considerations of race, and in particular, racial quotas, are a necessary means of arresting *de facto* segregation in the public schools. Indeed, in fashioning a school desegregation remedy, race must inevitably be taken into account. In *McDaniel* v. *Barresi,* 402 U.S. 39 (1971), involving the busing of black students to other than their neighborhood schools, the Supreme Court declared:

> "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race'. . . . Any other approach would freeze the status quo that is the very target of all desegregation processes."

402 U.S. at 41 (citations omitted). Thus, in the limited circumstances of voluntary affirmative action, and in the absence of an invidious or pernicious intent attributable to the Board, we conclude that the Board was entitled to consider the probability of white flight in formulating a remedial plan to prevent *de facto* segregation in the public schools.

We are aware of no persuasive authority to the contrary. Appellants rely on the prior decision of this Court in *Lawlor* v. *Board of Education of the City of Chicago*, 458 F.2d 660 (7th Cir. 1972), *cert. denied*, 413 U.S. 921 (1973), as support for their contention that the racial quotas violate the strictures of the Fourteenth Amendment. In *Lawlor*, plaintiffs, who were parents of white students residing in the O'Toole Elementary School attendance area, brought a civil rights action under 42 U.S.C. § 1983 alleging that the administrative practices and policies of the Chicago Board of Education resulted in the denial of due process and equal protection of law by permitting too many black students to attend the O'Toole Elementary School, and that such conduct was causing the departure of white students and would result in the O'Toole attendance area becoming increasingly black. Plaintiffs sought a judicial declaration to that effect, and an injunction which would limit to a range of 10% to 25% the number of black students enrolled in the O'Toole area schools. In affirming the district court's dismissal of the complaint for failure to state a claim, we held that plaintiffs had no constitutional right and the Board had no constitutional duty to establish a particular racial balance.

The contention that appellants in the instant case have a constitutional *right* to demand that a school have a particular racial balance was rejected in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971).

Moreover, the absence of a constitutional *duty* on the part of the school authorities to establishing racially-based enrollments does not preclude the Board from prescribing a racial balance to remedy the segregative impact of demographic change. We therefore find appellants' reliance on *Lawlor* to be misplaced.

Nor do we regard the decision in *University of California Regents* v. *Bakke,* 438 U.S. 265 (1978), rendered subsequent to the district court's decision in this case, as requiring reversal. Clearly, the Plans do not suffer from the constitutional infirmity which the majority of the Supreme Court found existing in the total exclusionary admissions program in *Bakke.* The opinion of Mr. Justice Powell (Brennan, White, Marshall, and Blackmun, JJ., concurring) noted that the position of Allan Bakke, who may have been deprived altogether of a medical education, was wholly dissimilar to that of students who are bused from their neighborhood schools to a comparable school for integration purposes. *Bakke, supra* at 300, n.39. Thus, unlike the admission program in *Bakke,* race is not used under the Board's Plans as the basis for distributing a limited number of spaces among a large number of applicants. Appellants, unlike Allan Bakke, are not excluded from attending school by the racial quotas imposed in this case. Rather, the stabilization quotas established for students living in the Gage Park and Morgan Park attendance area merely involved the reassignment of students, each of whom has been afforded a viable opportunity to attend an integrated high school either at Gage Park or Morgan Park, which have been racially stabilized by the Plans, or at one of the 10 alternative integrated high schools which provide a guarantee of enrollment and bus transportation to facilitate attendance.

Accordingly, in view of the findings on the record of the existence of white flight and the compelling state interest in promoting integration, we hold that voluntary state action directed toward the prevention of *de facto* segregation in the public schools is constitutionally permissible where, as here, the racial quotas imposed in connection with the desegregation plan provide all students residing in the attendance areas with a meaningful opportunity to attend an integrated high school.

C

As an independent basis for finding a violation of the equal protection clause, the appellants contend the Board failed to establish that the objective of preventing *de facto* segregation in the public schools could not be achieved by less discriminatory alternatives. Appellants argue in this connection that the racial quotas operated to devolve upon minority students the entire burden of desegregation, since only minority students were excluded from attending Morgan Park and Gage Park High Schools.

It is true that no white student was ever denied admission to Gage Park or Morgan Park High Schools under the Plans. But it is also true that white students enrolled in these high schools were precluded from transferring to another school until the quota for white students had been exceeded and that when the white enrollment exceeded the established quotas they also would be denied admission. Thus, the implementation of the racial quotas resulted in the exclusion of minority students only because the Plans were designed to address the practical problem of the exodus of white students from Gage Park and Morgan Park, and not because of any inherent inequity in the Plans themselves. Indeed, the racial quotas established for each high school permitted more minority stu-

dents than white students to enroll, even though the white student population exceeded the nonwhite student population residing in the attendance areas serving these schools. As the district court found, the racial balance at Gage Park is 58.2% nonwhite and 41.9% white, and the racial balance achieved at Morgan Park is 59% nonwhite and 41% white.

The appellants have advanced alternative proposals which they claim would preserve integrated student bodies at Gage Park and Morgan Park High Schools in a less discriminatory fashion. We are not persuaded, however, that these alternatives offer a viable means of preventing *de facto* segregation at these two high schools. Moreover, we regard the mechanics of integration, particularly in the circumstances of voluntary remedial action, where the purpose is obviously to implement the promise of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and effectively achieves that objective, to be ordinarily a matter within the discretion of local school authorities.

Accordingly, in view of the compelling state interest in preventing *de facto* school segregation, the realities of population change, and the discretion accorded to local school authorities in fashioning desegregation remedies, we perceive no invidious discrimination in the Board's modified stabilization quota plans, which successfully arrested the segregative impact of demographic change and preserved the integrated character of the enrollments at Gage Park and Morgan Park High Schools.

IV

Appellants also appeal from the judgment entered upon the district court order denying their petition for attorneys fees, contending they were entitled to such fees under the Emergency School Aid Act, 20 U.S.C. §§ 1601 *et seq.*, and under the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988. We are unpersuaded by the arguments

advanced in support of this contention, and therefore conclude that the district court properly denied the requests for attorneys fees.

An award of attorneys fees under the statutes relied upon by the appellants is predicated upon the express condition precedent that the petitioner be a prevailing party, and even then, fees may only be awarded upon the exercise of the court's discretion. Title 20 U.S.C. § 1617; Title 42 U.S.C. § 1988. It is patently clear from the record that the appellants were not the prevailing parties in these proceedings. The relief sought by their complaints was the abolition of the Board's Student Racial Stabilization Quota Plans instituted at Gage Park and Morgan Park High Schools. Since the district court upheld the Plans as constitutional, it cannot be said that the appellants prevailed on the merits of their complaints.

Moreover, even assuming *arguendo* that appellants "prevailed" in the sense that these actions resulted in the modification of the Plans to provide bus transportation to alternative schools for students denied admission to Gage Park and Morgan Park High Schools, there is no basis in the record for concluding that the district court abused its discretion in denying appellants' petition for attorneys fees.

For the foregoing reasons, the judgments appealed from are affirmed and the Clerk of this Court is directed to enter judgment accordingly.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

Order of the District Court after Remand

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

and

DARCEL MILTON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

---

76 C 995 and 76 C 996 (Consolidated)
Judge Hubert Will

ORDER

This cause coming on to be heard on Plaintiffs' Motion for Declaration of Non-Mootness and for Entry of Injunction, and the Court being fully advised in the premises,

This Court finds that the Chicago Board of Education has readopted the racial quotas at Morgan Park and Gage Park High Schools, and that this case accordingly is not moot.

For the reasons stated in this Court's Findings of Fact and Conclusions of Law dated December 30, 1977, Plaintiff's Motion for Entry of Injunction is denied, and this Court hereby reinstates its Judgment Order of December 30, 1977 in full force and effect.

Defendants' oral Motion to Supplement the Record is denied.

ENTER:

6/11/81

/s/ *Hubert L. Will*
Hubert L. Will
United States District Judge

APPENDIX D

Original Judgment Order of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

and

DARCEL MILTON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

---

76 C 995 and 76 C 996 (Consolidated)

JUDGMENT ORDER

These actions having come on for trial by the Court, without a jury, and the issues having been duly heard, a decision having been duly rendered, and the Court having made its findings of fact and having stated its conclusions of law,

IT IS ORDERED AND ADJUDGED:

1. That defendants Board of Education of the City of Chicago, *et al.*, their successors, and any others acting in concert with any of them, be and hereby are permanently enjoined and prohibited from adopting, maintaining, or implementing any admissions or racial quota plan for Morgan Park or Gage Park High School which excludes black or Hispanic students, without providing them with an opportunity to attend an integrated general high school in the Chicago public school system which is equivalent to the opportunity provided by Board Report No. 77-212-16 (Revised), as modified by this Court's order of August 12, 1977.

2. That plaintiffs recover of defendant, Board of Education of the City of Chicago, their costs herein.

3. That a ruling on plaintiffs' petition for attorneys' fees shall be and is reserved.

DATED at Chicago, Illinois, this 30th day of December, 1977.

/s/ *Hubert L. Will*
United States District Judge

APPENDIX E

Findings of Fact and Conclusions of Law by the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

DARCEL MILTON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

No. 75 C 995 and No. 75 C 996 — Consolidated

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

These actions having come on for trial by the Court, without a jury, on plaintiffs' complaints, and on defendants' answers thereto, and the parties having stipulated to certain facts by means of a pretrial order entered here-

in on May 23, 1977 and a First Amendment thereto entered herein on July 29, 1977, and additional evidence submitted by and on behalf of the parties having been made a part of the record herein, and the Court having heard the arguments of counsel with respect thereto, the Court, pursuant to Rule 52, Fed.R.Civ.P., hereby finds the facts and states its conclusions of law as follows:

Findings of Fact

1. Morgan Park High School, 1744 W. Pryor Avenue (11200 South), Chicago, and Gage Park High School, 5630 S. Rockwell Avenue (2600 West), Chicago, are public high schools owned and operated by the Board of Education of the City of Chicago.

2. Plaintiffs in *Johnson* v. *Board of Education* are black children who reside in the Morgan Park attendance area, and their parents. Plaintiffs in *Milton* v. *Board of Education* are black children who reside in the Gage Park attendance area, and their parents. But for the "student racial stabilization plans" freezing enrollment and establishing racial quotas instituted and applied by defendant Chicago Board of Education, all eighth-grade students residing in the Gage Park or Morgan Park attendance areas would have been offered the opportunity to attend Gage Park or Morgan Park High School.

3. In 1975, Gage Park High School was approximately 41% white and 59% minority, while Morgan Park High School was 37% white and 63% minority. The comparable figures for 1976 are 42% white and 58% minority for Gage Park and 38% white and 62% minority for Morgan Park. Black children attending Gage Park and Morgan Park are thus attending school in an integrated setting.

4. The Morgan Park High School and Gage Park High School attendance areas were in part undergoing accelerated racial change from white to black in 1975-1976. The schools were also over capacity because of increasing enrollment.

5. During the period from 1972 to 1975, black student enrollment at Morgan Park had increased from 52.3% to 62.3% and white student enrollment had declined from 45.7% to 36.9%. In this same period, total enrollment increased from 3092 to 3423. As of January 30, 1976, enrollment at Morgan Park High School was 3323 and the school was operating at 128.6% of capacity of permanent facilities. The racial composition of all students attending public and non-public elementary schools residing in the Morgan Park attendance area in 1976 was 6842 black, 7312 white, and 144 other.

6. During the period from 1972 to 1974, black student enrollment at Gage Park had increased from 1056 to 1361. As of January 30, 1976, enrollment at Gage Park High was 2441 and the school was operating at 106% of capacity. The racial composition of all students attending public and non-public elementary schools residing in the Gage Park attendance area in 1975 was 5235 black, 8617 white, 1174 Hispanic and 110 other.

7. On May 14, 1975, the Board of Education of the City of Chicago adopted a student racial stabilization plan establishing a ceiling on enrollment and a racial quota with respect to admissions to Gage Park High School. Under this quota plan, the racial composition of Gage Park High School was to be 48% black, 42% white, 8% Hispanic and 2% principal's option with the selection of incoming freshmen students to be made by lottery.

8. The Board adopted an enrollment ceiling and racial stabilization quota plan for Morgan Park High School on March 10, 1976, that differs in two respects from that applied to Gage Park. The Morgan Park plan set a 50% white and 50% black quota with respect to each entering class, rather than the school as a whole. In addition, the Morgan Park quota plan provides for the admission of a maximum of 350 black students even if less than 350 white students apply. By contrast, the Gage Park plan admits black students to the extent that sufficient numbers of white students are in attendance so that the requisite overall 48 to 42 black-to-white ratio can be maintained.

9. The first lottery, in preparation for the 1975 school year at Gage Park High School, was held on June 2, 1975. Since the racial percentages were to be applicable to the school as a whole rather than to the incoming class, the entering class at Gage Park in September 1975 was in actual fact 43% white (267/615), 42% black (259/615) and 14% Hispanic (85/615).

10. The Gage Park racial quota plan was also applied to the class entering Gage Park High School in September 1976, with the applicable lottery drawing held on January 19, 1976. The entering class in 1976 as determined by the drawing was 44% white (229/519), 43% black (224/519) and 12% Hispanic (61/519).

11. A student racial/ethnic survey dated October 29, 1976, and conducted by the Board of Education, shows that the entering freshman class of September 1976 at Gage Park was in fact 42.6% white (228/535), 45.4% black (243/535) and 11.4% Hispanic (61/535). In 1975 and 1976, all freshmen attended the Gage Park High School "branch," which is on the same campus as Gage Park High School, is part of the permanent facility, and is used for freshmen only.

12. The Board's stated purpose for adoption of the racial quotas was to prevent overcrowding and to prevent Gage Park and Morgan Park High Schools from becoming increasingly black. Consequently, the quota for admission of black students at each school was necessarily set at a lower level than that at which black students would have applied and been admitted but for the quota.

13. No white student was ever denied admission as a result of the quotas instituted at Gage Park and Morgan Park High Schools, but hundreds of black and Hispanic students have been denied admission annually since the racial quotas were instituted.

14. Under the racial quota plans, separate lottery lists are made for white, black and (in the case of Gage Park) Hispanic students. Students are admitted to Gage Park or Morgan Park High Schools, as the case may be, in the order their names appear on the applicable lottery lists until the quota for their race is filled.

15. The group of students accepted into Gage Park for the September 1975 school year included all those names down to a red line on the lottery list for each race. The red line appears immediately below the last name on the white list, No. 289. By contrast, the red line appears below name No. 200 on the black list, which has a total of 498 names, indicating the exclusion as of that date of 298 black applicants.

16. Within two weeks thereafter, an additional 60 black elementary students were given the option to enroll into Gage Park High School. By October 1, 1975, all of the original 498 black students had been offered the option of enrolling in Gage Park High School. Another 212 black students, who applied for admission after the lottery of

June 2, 1975, were not offered the option of enrolling into Gage Park High School. Each of the 136 additional white students applying for admission after June 2, 1975 was admitted.

17. With respect to the January 1976 Gage Park drawing for the September 1976 school year, a red line again appears immediately below the last name on the white list, No. 309. By contrast, the red line appears below name No. 300 on the black list, which has a total of 626 names, indicating the exclusion at the time of the drawing of 326 black applicants.

18. With respect to the Gage Park lottery for the September 1976 school year, all 309 white students included in the January 19, 1976 drawing, and all 181 white students applying thereafter were offered the opportunity to enroll at the time of the lottery drawing or at the time they applied. Of the 626 black students included in the lottery drawing and the 210 additional black students applying thereafter, 300 black students were permitted to enroll and 243 actually attended Gage Park High School. At least 411 black students were excluded from Gage Park High School as of October 12, 1976 as a result of the racial quota.

19. The lottery to determine September 1976 admissions to Morgan Park High School was held on April 30, 1976. As of October 29, 1976, 538 black and 490 non-black students were eligible to apply to the 1976 freshman class. As of May 10, 1976, ten days after the drawing, every white student but one was offered the option to enroll in Morgan Park. The highest lottery number offered the option to enroll of 484. The one exception was Arlene Mickley, who apparently was never assigned a lottery number, and who was notified of her admission to Morgan Park on May 11, 1976. An additional 33 white students applying as transfer

students thereafter were also admitted to Morgan Park High School.

20. In the 1976 Morgan Park lottery, as of May 10, 1976, 350 black students were offered the option to enroll in Morgan Park, the option to enroll with the highest lottery number then offered being No. 368. One hundred and thirty-one (131) black students were denied admission as of that date. As of October 29, 1976, the number of black students denied admission was 126, which included 15 black transfer students. No white student was ever denied admission to Morgan Park as a result of the 1976 lottery. The number of students actually admitted to Morgan Park High School as freshmen in September 1976 (as of October 29, 1976) was 350 black and 272 non-black.

21. Students denied admission as a result of the racial quotas are placed on a "waiting list," and are offered the opportunity to attend Morgan Park or Gage Park High Schools in the event another student of the same race, previously admitted to the school, elects not to attend, and with respect to Gage Park High School, if additional white students elect to attend so that additional black students may be admitted and still maintain the prescribed racial balance.

22. With respect to the Morgan Park lottery, 33 of the black students on the waiting list were offered the opportunity to enroll on or after September 27, 1976 (some as late as October 13, 1976), several weeks after the beginning of school. A number of such students, who were attending other schools at that time, declined the opportunity to transfer to Morgan Park.

23. At the time the student racial stabilization quota plans were adopted, there were substantially more white

students than black students in public and non-public elementary schools in the Morgan Park and Gage Park attendance areas. However, it became apparent after the plans were in operation that the number of white sstudents seeking admission at each high school was less than the quota set for white students and that the number of blacks and Hispanic students applying exceeded the quotas for those groups.

24. Students denied admission as a result of the racial quota plans as originally adopted by the Board were permitted to attend any "under-utilized" Chicago public high school. These under-utilized schools are the same schools which under the provisions of Board Report No. 75-494-10 (adopted April 30, 1975), a Permissive Transfer Program, every child attending an over-utilized high school in the City of Chicago (which includes Gage Park and Morgan Park High Schools) was given the option of attending. Thus, under this Program, prior to and irrespective of the racial quota plans, Gage Park and Morgan Park High School students could have elected to attend these under-utilized schools.

25. Until the Board adopted a revised voluntary transfer program in July 1977, as described in Finding No. 39, excluded students residing in the Morgan Park and Gage Park attendance areas were required to travel to alternative schools using public transportation. Carfare was provided to students excluded from Gage Park High School commencing in September or October 1976, and for students excluded from Morgan Park High School from the inception of the racial quota for that school.

26. These plans were attempts on the part of the Board to relieve overcrowding and to promote integration in

schools situated in rapidly changing neighborhoods. Experience has shown that the Board has achieved both objectives at each school. The racial balance at Gage Park High School is 45.4% black, 41.9% white, 12.7% other, and the racial balance at Morgan Park High School is 59% black and 41% white. The enrollment at Gage Park has been reduced to 2102 and the school is operating at 91.3% of capacity. The Morgan Park enrollment has been reduced to 2613 and the school is operating at 101.2% of capacity.

27. The following is the racial composition of the eighteen general high schools listed as available to those denied admission as a result of the racial quotas:

School	1975 Racial %			1976 Racial %		
Mather	93.0W;	1.4B;	1.7H	89.6W;	1.2B;	2.9H
Roosevelt	77.9W;	6.0B;	9.7H	76.0W;	2.7B;	12.6H
Sullivan	77.2W;	7.0B;	8.3H	73.4W;	8.2B;	8.8H
Von Steuben	67.8W;	10.3B;	14.2H	63.2W;	7.4B;	18.4H
Lake View	47.3W;	2.6B;	44.8H	43.6W;	3.3B;	47.1H
Senn	47.3W;	15.7B;	22.6H	44.0W;	15.3B;	24.3H
Kenwood	26.6W;	66.3B;	2.8H	26.4W;	66.7B;	2.8H
Wells	18.6W;	23.0B;	57.5H	16.3W;	23.7B;	59.5H
Tilden	11.6W;	75.7B;	12.6H	11.1W;	76.8B;	11.8H
Waller	10.2W;	70.2B;	17.9H	9.1W;	72.3B;	17.4H
Harrison	5.0W;	59.8B;	35.0H	5.1W;	42.4B;	52.2H
Farragut	2.2W;	82.9B;	14.8H	1.5W;	83.4B;	15.1H
Manley	0W;	99.9B;	.1H	0W;	99.9B;	0H
Marshall	0W;	100.0B;	0H	0W;	100.0B;	0H
Crane	0W;	99.9B;	.1H	0W;	99.8B;	.2H
DuSable	0W;	100.0B;	0H	0W;	100.0B;	0H
Hyde Park	0W;	100.0B;	0H	0W;	99.7B;	.3H
Carver	0W;	100.0B;	0H	0W;	100.0B;	0H

28. Of these eighteen under-utilized schools, six have significant white enrollments. These are Roosevelt (78%/

76% white in 1975/1976), Von Steuben (68%/63% white), Mather (93%/90% white), Sullivan (77%/73% white), Lakeview (47%/44% white) and Senn (47%/44% white). These schools are located on the north side of the City of Chicago. None is south of 4000 North and three are north of 5800 North. By contrast, Gage Park High School is located at 5600 South and Morgan Park is at 11200 South. The closest of these schools (Lakeview) is 11.4 miles from Gage Park and 18.15 miles from Morgan Park High School.

29. Travel to the schools listed in Finding No. 27 from Gage Park or Morgan Park High Schools involves (1) taking a bus to the Dan Ryan rapid transit line; (2) transferring from the Dan Ryan to the Howard or Ravenswood rapid transit lines; (3) travel on the Howard or Ravenswood rapid transit lines and, in two instances, (4) an additional bus trip to the school.

30. The following is a table of schools attended by 317 of the 416 black students excluded as a result of the 1975

Gage Park lottery. Data with respect to the 99 additional black students is not readily available:

Schools attended by 317 black students excluded from Gage Park under 1975 racial quota

Harper	0W;	99.9B;	0H	139
Hyde Park	0W;	100B;	0H	31
Dunbar	0W;	99.6B;	0H	23
Englewood	0W;	99.9B;	0H	18
King	0W;	100B;	0H	17
DuSable	0W;	100B;	0H	13
C.V.S.	0W;	99.8B;	.2H	8
South Shore	.1W;	99.5B;	.3H	7
Lindblom	.1W;	97.2B;	.1H	7
Crane	0W;	99.9B;	.1H	6
Tilden	11.6W;	75.7B;	12.6H	5
Calumet	0W;	99.9B;	0H	4
Hubbard	93.9W;	0B;	3.9H	4
Farragut	2.2W;	82.9B;	14.8H	3
Harrison	5.0W;	59.8B;	35.0H	3
Curie	77.8W;	16.8B;	5.8H	3
Parker	0W;	99.8B;	.2H	3
Hirsch	0W;	99.6B;	.3H	3
Austin	.2W;	99.6B;	.2H	2
Phillips	.1W;	99.9B;	0H	2
Harlan	.1W;	99.9B;	0H	2
Fenger	1.2W;	96.7B;	2.0H	2
Julian	.2W;	99.7B;	.1H	1
Tubman Fam.Lvg Ctr	0W;	100B;	0H	1
Manley	0W;	99.9B;	.1H	1
Moseley Soc.Adj.Sch.	0W;	89.8B;	10.2H	1
Bousfield Soc.Adj.Sch.	0W;	100B;	0H	1
Orr	5.0W;	78.6B;	15.9H	1
Jones Commercial	10.6W;	62.6B;	22.8H	1
Waller	10.2W;	70.2B;	17.9H	1
Metro	46.7W;	45.6B;	4.6H	1
Young	34.0W;	44.5B;	15.9H	1
Schurz	78.3W;	1.4B;	18.8H	1
Kelly	82.7W;	.1B;	16.7H	1
			TOTAL	317

31. The following is a list of schools attended by students excluded as a result of the 1976 Gage Park lottery:

Schools attended by those excluded from Gage Park under 1976 quota

Hyde Park	0W;	99.7B;	.3H	90
DuSable	0W;	100B;	0H	73
Collins	.1W;	98.8B;	1.1H	65
Harper	0W;	99.9B;	0H	61
Dunbar	0W;	99.5B;	.4H	37
Harrison	5.1W;	42.4B;	52.2H	34
Lindblom	.1W;	99.7B;	.2H	33
Tilden	11.1W;	76.8B;	11.8H	33
Kenwood	26.4W;	66.7B;	2.8H	25
Simeon	0W;	100B;	0H	23
C.V.S.	.5W;	99.1B;	.4H	14
Englewood	0W;	99.8B;	.2H	9
Curie	75.7W;	17.2B;	6.5H	7
Calumet	0W;	99.6B;	.4H	5
Parker	0W;	100B;	0H	5
King	0W;	100B;	0H	4
Colley	0W;	99.8B;	.2H	3
Phillips	0W;	99.9B;	0H	3
Jones Commercial	7.4W;	70.6B;	21.5H	3
Austin	.1W;	99.7B;	.1H	2
Corliss	0W;	99.9B;	.1H	1
Crane	0W;	99.8B;	.2H	1
Harlan	0W;	99.9B;	0H	1
Hirsch	0W;	99.6B;	.3H	1
Westinghouse	0W;	100B;	0H	1
Orr	3.7W;	79.7B;	16.5H	1
Waller	9.1W;	46.7B;	6.0H	1
Young	28.9W;	52.7B;	14.7H	1
Kelly	78.1W;	.1B;	21.2H	1
Prosser	73.2W;	10.8B;	14.1H	1
			TOTAL	539

32. As of September 20, 1976, 193 black students had been excluded as a result of the 1976 Morgan Park racial quota. Two of these students attended Kenwood (27%/26% white), while the remaining 191 attended schools which were over 99% minority. Nearly all the excluded students not attending a special technical or vocational high school (110 of 117 students) attended Carver High School, the closest under-utilized school to Morgan Park.

33. Students excluded from Gage Park and Morgan Park High Schools as a result of the 1975 and 1976 racial quota plans were permitted to attend only under-utilized schools, with "under-utilized" defined to mean a school with a total student enrollment below "the city-wide percent of capacity" of 101.3%.

34. In 1975, 22 of 51 general high schools were above the level of 101.3% utilization (excluding so-called "temporary facilities"). In 1976, 29 of 51 general high schools were above that level.

35. As a consequence of the criteria limiting black students excluded from Morgan Park and Gage Park High Schools to "under-utilized" schools—*i.e.*, schools with total enrollments below 101.3% (Finding No. 33)—such students were not permitted to attend any of the following schools: Kelly (82.7%/78.1% white; 138.5%/141.5% utilization); Kennedy (89.8%/89.0% white; 127.7%/110.4% utilization); Bogan (99.2%/97.4% white; 130.4%/126.6% utilization); Hubbard (93.9%/93.4% white; 127.3%/110.1% utilization); Washington (94.3%/93.3% white; 119.6%/115.8% utilization); Amundsen (83.4%/80.1% white; 104.2%/108.5% utilization [1975/76]); Foreman (95.7%/95.2% white; 127.8%/127.4% utilization); Kelvyn Park (65.4%/58.2% white; 118.6%/126.1% utilization); Schurz (78.6%/75.3% white, 101.3%/103.9% utilization); or Steinmetz (92.5%/90.9% white, 116.4%/115.9% utilization). Some of these

schools are more accessible to excluded Gage Park and Morgan Park students' homes than the white or integrated "under-utilized" schools which have been made available to them.

36. On January 21, 1977, a lottery drawing was held for the September 1977 freshman class in Gage Park High School. Of 754 black children in the lottery drawing, 425 were accepted as enrollees and 329 were denied admission. Of 85 Hispanic students, 30 were accepted and 50 were denied admission. Not one of the 364 white students who applied was denied admission.

37. On February 3, 1977, a lottery drawing was held for the September 1977 freshman class in Morgan Park High School. Six hundred ten white students and 612 black students had their names included in the lottery drawing. In April 1977, each white child who wished to attend Morgan Park High School was notified of his admission; the total number admitted was 317. At the same time, 350 black children were notified of their admission, and 157 black children who wished to attend the school were excluded.

38. On June 29, 1977, this case came on for trial, plaintiffs appearing with their witnesses. At that time counsel for the Board indicated that a modification of the racial quotas was being proposed to the Board of Education and that the Board would waive its right to present any evidence not already in the record. The Board also stipulated to certain additional facts, and both sides rested. The Court then stated that it was prepared to find the racial quotas as originally adopted to be unconstitutional, but would reserve final ruling pending any modification the Board might wish to present.

39. On July 13, 1977, the Board of Education adopted Board Report No. 77-212-16 (Revised), which modified the Gage Park and Morgan Park racial quota plans by providing excluded black and Hispanic students the option of attending certain North Side predominantly white and integrated schools by means of bus transportation provided by the Board of Education.

40. The following schools were made available to excluded Gage Park and Morgan Park black children under Board Report No. 77-212-16 (Revised):

Receiving School	No. of students who may transfer from Gage Park High School attendance area	No. of students who may transfer Morgan Park High School attendance area
Roosevelt	130	50
Taft	50	—
Von Steuben	92	50
Mather	100	50
Sullivan	100	50
Curie	50	50
Lane Technical	100	50
Schurz	150	40
Senn	200	—
Lake View	140	50
	150*	
TOTAL:	1,262	390

* Places originally designated for Metropolitan High School.

41. By this Court's order of August 12, 1977, the Board was directed to implement procedures for publicity and student counseling with respect to the alternatives provided by Board Report No. 77-212-16 (Revised), and to provide that designated places at the alternative schools

which were not filled by students excluded from one school (*e.g.*, Morgan Park) would be made available to students excluded from the other school (*e.g.*, Gage Park).

42. As of October 12, 1977, 102 of the 1632 students excluded as a result of the Morgan Park and Gage Park racial quotas had availed themselves of the opportunity provided by Board Report No. 77-212-16 (Revised). The following is the number of students attending each alternative school:

PARTICIPATING STUDENTS FROM MORGAN PARK AREA

Receiving School	Number of Buses	Number of Passengers	Bus Cost Per Day
Von Steuben)	1	32	
Lane)		3	$120
Roosevelt	1	23	120
Curie	1	10	120
Subtotals:	3	68	$360

PARTICIPATING STUDENTS FROM GAGE PARK AREA

Curie	2	9	$ 240
Roosevelt)			
Von Steuben)	1	8	120
Lane)	1	1	
Lake View)		16	120
Subtotal:	4	34	$ 480
TOTALS:	7 Buses	102 Students	
COSTS:	Bus Cost		$ 840
	Aides		174
			$1014 per day

Cost per student per day: $9.94.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter hereof by reason of 28 U.S.C. §§ 1331, 1343 and 2201, and 20 U.S.C. § 1706.

2. The defendant Board of Education of the City of Chicago is a body politic and corporate, and an agency of the State of Illinois, and may be sued as such.

3. The racial quota as originally adopted by the defendant Board deprived at least some of the plaintiffs of their rights under the Constitution of the United States and their rights under 42 U.S.C. §§ 1981 and 1983 and 20 U.S.C. § 1703(c), in that they did not give excluded students a viable opportunity to attend other integrated schools.

4. Those plaintiffs who were adversely and unlawfully affected by the racial quota plans as originally adopted were made to suffer irreparable injury for which there was no adequate remedy at law.

5. The so-called "voluntary transfer" plan adopted by the Board on July 13, 1977 as subsequently modified, restored to those plaintiffs who were adversely and unlawfully affected by the racial quota plans their rights under the Constitution of the United States and under 42 U.S.C. §§ 1981 and 1983 and 20 U.S.C. § 1703(c), in that under said voluntary transfer plan there was made available to such plaintiffs a meaningful opportunity to attend a Chicago public high school in an integrated setting.

6. The aforesaid voluntary transfer plan was adopted by the Board only after plaintiffs had filed their complaints herein, engaged in substantial discovery, and had answered ready for trial on the merits, and only after said trial was commenced and the Court indicated that it was prepared to find the racial quota plans as originally adopted to be un-

constitutional, and said voluntary transfer plan would not have been adopted but for the efforts of plaintiffs and their counsel.

7. Plaintiffs and others similarly situated would suffer irreparable injury if the voluntary transfer plan, adopted by the Board as a result of the instant suit, were modified or abandoned.

8. It is desirable and appropriate that the Board continue in this way and to that end the Board of Education will be enjoined to maintain and continue said plans, as modified, incorporating provisions for the voluntary busing of excluded students living in the Morgan Park or Gage Park areas to alternative integrated public high schools.

9. A permanent injunction will issue directing or requiring defendants to maintain and continue a transfer plan equivalent to the plan set forth in Board Report No. 77-212-16 (Revised).

10. Plaintiffs are entitled to recover their costs herein.

11. The Court reserves ruling on plaintiffs' petition for attorneys fees.

DATED at Chicago, Illinois, this 30th day of December, 1977.

/s/ Hubert L. Will
United States District Judge

APPENDIX F

Original Order of the District Court on Attorneys Fees

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

and

DARCEL MILTON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

---

76 C 995 and 76 C 996 (Consolidated)

ORDER

Whereas plaintiffs have filed a Petition for costs and attorneys' fees, and the Court having considered said Petition and the submissions of the parties in connection therewith,

IT IS ORDERED THAT

1. Plaintiffs shall recover from defendant Board of Education of the City of Chicago the sum of $908.31, as their costs and out-of-pocket expenses in this matter;

2. Plaintiffs shall recover from defendant Board of Education of the City of Chicago the additional sum of $1,000, as a witness fee for their expert witness, Professor Karl E. Taeuber; and

3. Plaintiffs' Petition for Attorneys' Fees is otherwise hereby denied.

Dated at Chicago, Illinois
this 23rd day of January, 1978.

/s/ Hubert L. Will
United States District Judge

APPENDIX G

Judgment of the Court of Appeals Sought to Be Reviewed

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 24, 1981

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Thomas E. Fairchild, Senior Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

KATHY SUE JOHNSON, et al.,

Plaintiffs-Appellants,
Cross-Appellees,

Nos. 81-1965, 81-2001 vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 995 and 996
Judge Hubert L. Will

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this court filed this date. The parties shall bear their own costs on appeal.

APPENDIX H

Original Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 13, 1979

Before
Hon. Latham Castle, Senior Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

KATHY SUE JOHNSON, et al., and
DARCEL MILTON, et al.,

Plaintiffs-Appellants,

No. 78-1215 vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
No. 76-C-995 & 76-C-996

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

APPENDIX I

Court of Appeals Order Denying Rehearing

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
December 6, 1979.

Before

Hon. Latham Castle, Senior Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

KATHY SUE JOHNSON, et al.,

Plaintiffs-Appellants,

No. 78-1215 vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees.

and

DARCEL MILTON, et al.,

Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendants-Appellees.

On Petition for Rehearing and Suggestion for Rehearing *En Banc*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the Plaintiffs-Appellants, no judge in active service has requested a vote thereon,* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Hon. Walter J. Cummings and the Hon. Robert A. Sprecher did not participate in any consideration of the petition for rehearing *en banc*.

APPENDIX J

Court of Appeals Order Remanding After Supreme Court Mandate

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 14, 1981.
Before

Hon. Latham Castle, Senior Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

KATHY SUE JOHNSON, etc., et al., and
DARCEL MILTON, etc., et al.,

Plaintiffs-Appellants,

No. 78-1215 vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees.

On Remand from the Supreme Court of the United States

ORDER

On August 13, 1979, we held that the student assignment plan in effect at Gage Park and Morgan Park High Schools, which imposed racial quotas on enrollment, did not violate the fourteenth amendment. *Johnson* v. *Board of Education of Chicago,* 604 F.2d 504 (7th Cir. 1979). By an order dated October 29, 1980, the Supreme Court vacated our judgment and remanded the case to this court

> for further consideration in light of the subsequent developments described in the suggestion of mootness filed by respondents on October 2, 1980; the response of petitioners filed on October 10, 1980; the response of the United States as *amicus curiae* filed on October 10, 1980; and the reply filed October 15, 1980.

The subsequent developments referred to by the Supreme Court order are (1) the consent decree entered in the District Court for the Northern District of Illinois, Judge Milton Shadur presiding, that requires the Chicago Board of Education to submit a desegregation plan that "ensure[s] that the burdens of desegregation are not imposed arbitrarily on any racial or ethnic group" to that court by March 11, 1981, *United States* v. *Board of Education of Chicago*, No. 80 C 5124 (N.D. Ill. Sept. 24, 1980), and (2) the Board of Education's announcement of October 1, 1980, that the Gage Park and Morgan Park High School assignment plan will be discontinued effective at the close of the 1980-81 school year. The Board of Education announcement states that the decision to discontinue the assignment plan is based on the September 24, 1980, consent decree entered by Judge Shadur.

We are unable to determine from the record before us whether the September 24 consent decree and the Board of Education decision to terminate the assignment plan render this case moot. We remand to the district court pursuant to 28 U.S.C. § 2106 for a determination of whether the consent decree, the Board decision concerning the quota assignment plan, and any subsequent desegregation plan approved on the basis of the consent decree moot this case.

REMANDED

Opposition

Office - Supreme Court, U.S.
FILED
JAN 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1097

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KATHY SUE JOHNSON, etc. et al., and
DARCEL MILTON, etc. et al.,
Petitioners,

v.

BOARD OF EDUCATION
OF THE CITY OF CHICAGO, et al.,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1976, petitioners challenged racial quota student assignment plans utilized to preserve integration and relieve overcrowding at Gage Park and Morgan Park high schools in Chicago. In 1980, respondent Board of Education and the Department of Justice entered into a consent decree requiring the Board to implement a system-wide desegregation plan. The quotas at these two high schools were dropped immediately following the consent decree but were reinstated several months later in modified form as elements of the system-wide plan. The Petition for Writ of Certiorari seeks a determination of the constitutionality of the quota plans as they operated in 1976, without regard to the changed factual and legal context wrought by the 1980 consent decree. Although the consent decree provides for continuing District Court jurisdiction over decree compliance and plan implementation, petitioners have not sought to present their objections in that litigation to the quota plans as they operate in this new context. The questions presented are:

1. Whether the 1980 consent decree mandating a system-wide desegregation plan moots or otherwise renders inappropriate for review petitioners' 1976 action to enjoin racial admissions quotas continued in modified form as one of many elements of a system-wide desegregation plan?

2. Whether the Board of Education is precluded from making race-conscious student assignments in complying with a consent decree that resolved a Department of Justice complaint alleging racial discrimination?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1097

KATHY SUE JOHNSON, etc. et al., and
DARCEL MILTON, etc. et al.,
Petitioners,

v.

BOARD OF EDUCATION
OF THE CITY OF CHICAGO, et al.,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

As explained in the body of this Opposition, petitioners' case has become moot.

STATEMENT OF THE CASE

In the early 1970's, the neighborhoods around Gage Park and Morgan Park high schools were marked by rapid racial change. The result was that the two high schools were simultaneously becoming overcrowded and predominantly black. In 1975 and 1976, respondents adopted racial admissions quotas at the two schools to preserve integration and alleviate overcrowding. Petitioners brought this action to enjoin the quota plans shortly thereafter.

The entire context of the litigation has changed markedly since this Court granted the first Petition for a Writ of Certiorari in July 1980. When the case was last before this

Court, petitioners argued that while respondents' stated purpose for the quota plans was benign (the preservation of integrated education), this fact was entitled to little or no weight because respondents had not taken additional steps to integrate predominantly white schools. Petitioners asserted:

> "At the outset, it is important to note what this case does *not* involve.
>
> "Petitioners do not contend that school children have an absolute right to attend a neighborhood school. Nor do they urge that a school board which treats the races equitably may not take race into account in school assignments as part of an effort to desegregate its school system." (Pet. Brief at 11, emphasis in original)

This concession is conspicuously absent from the new Petition, and the reason for its absence is clear. On September 24, 1980, the Board of Education became the first large Northern school district to enter into a desegregation consent decree with the United States (App. 6-18), settling a Department of Justice lawsuit alleging that the Board had engaged in racial discrimination. (App. 1-5)

That decree obligates the Board to "develop and implement a system-wide plan to remedy the present effects of past segregation of Black and Hispanic students." (App. 8) The four "Basic Objectives" of the desegregation plan outlined in that decree are:

> "*Desegregated Schools.* The plan will provide for the establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago.
>
> "*Compensatory Programs in Schools Remaining Segregated.* In order to assure participation by all students in a system-wide remedy and to alleviate the effects of both past and ongoing segregation, the plan shall provide educational and related programs for any Black or Hispanic schools remaining segregated.
>
> "*Participation.* To the greatest extent practicable, the plan will provide for desegregation of all racial and ethnic groups, and in all age and grade levels above kindergarten.

> "*Fair Allocation of Burdens.* The plan shall ensure that the burdens of desegregation are not imposed arbitrarily on any racial or ethnic group." (App. 8)

The decree ensures compliance with constitutional requirements, these Basic Objectives and the timetable for implementation by providing for continuing jurisdiction in the District Court. (App. 7)

In addition to entering into the consent decree, the Board announced on October 1, 1980 that the challenged quota plans were discontinued, effective at the end of the 1980-81 school year.

On the basis of these facts, the Board filed a suggestion of mootness, and on October 20, 1980, this Court remanded the case to the Court of Appeals for a determination of the mootness issue. The Court of Appeals in turn remanded to District Judge Will.

While the mootness issue was pending in the District Court, the Board was continuing its program to comply with the desegregation consent decree in the Department of Justice lawsuit. On April 29, 1981, the Board adopted "Student Assignment Principles" for its desegregation plan. (App. 19-31)

Those Principles are comprehensive. They define a desegregated school in racial percentage terms (App. 21); they establish procedures for student reassignment and obligate the Board to bear student transportation costs (App. 22); and they require adjustments in attendance areas and feeder patterns and maintenance of magnet schools to "[a]chieve the greatest practicable degree of integration/desegregation." (App. 23)

The first phase of the Principles, *implemented in September 1981,* included both voluntary techniques and mandatory reassignment through adjustments of attendance areas and feeder patterns. (App. 22, 23, 30) Also included in the September 1981 implementation was the re-establishment of the quota plans at Gage Park and Morgan Park high schools. Petitioners suggest that the Board's decisions first to discontinue and later to reinstate the quota plans were litigation strategies. In fact, the

Board discontinued the quota plans soon after executing the consent decree so that it could start from a clean slate in developing its system-wide plan. Eight months later it concluded that the quota plans, like other mandatory reassignment methods, should be included as an element of its system-wide plan. Consequently, the quota plans were reinstituted. Petitioners also intimate that the principal basis for the Board's suggestion of mootness was the discontinuance of the plans, rather than the entry of the consent decree. The reverse is true; the Board has consistently maintained that the existence of a system-wide desegregation plan is the principal reason why petitioners' challenge has become moot or no longer ripe for review. (*See* No. 79-1356, Resp. Suggestion of Mootness at 2)

In all events, the Board significantly modified the operation of the quota plan at Gage Park in September 1981 by shifting two predominantly white elementary schools from the feeder pattern of a nearby predominantly white high school to the racially integrated Gage Park. The Board's Report explains:

> "This adjustment is undertaken to implement certain provisions of the Student Desegregation Plan for the Chicago public schools: Recommendations on Part II, Student Assignment Principles, as adopted by the Board of Education on April 29, 1981 (Board Report 81-90-4).
>
> * * * *
>
> "This adjustment was made to increase the white membership at Gage Park High School. By increasing the white membership it will also increase the number of minority students eligible through the lottery system." (App. 37)

This feeder pattern change effectively excluded white students from their perceived "neighborhood" high school, just as minority students are excluded from their "neighborhood" schools under the quota plans. Additionally, students excluded from Gage Park and Morgan Park continued to have space reserved for them at, and free transportation provided for them to, every nearby predominately white high school, including schools listed on page 7, footnote ** of the Petition

as predominantly white schools petitioners suspected were being shielded from integration by the creation of "buffer zones" at Gage Park and Morgan Park. (App. 32-34, 50-52)

The Board took similar actions in September 1981 throughout the system to implement the desegregation plan. It made widespread changes in feeder patterns and attendance areas which displaced many white, black and Hispanic students from their perceived "neighborhood" schools.

Just as petitioners here are opposed to their mandatory reassignment, other students, black and white, were reluctant to accept the mandatory reassignments they faced last Fall. On September 15, 1981, the Chicago *Sun-Times* reported the initial public reaction to a particularly controversial boundary change.

> "Black and white parents, saying they wanted to shield youngsters from hostile neighbors, kept their children home Monday from two adjacent South Side schools that were to exchange pupils
>
> "Only 47 children showed up for classes at Hendricks and Graham elementary schools, which have a combined enrollment of about 1,200.
>
> "In an integration move, about half the pupils from the predominantly white Graham school, 4436 S. Union, were to switch places with half the pupils from all-black Hendricks, 4316 S. Princeton.
>
> "Students were reassigned last month when the Board of Education changed the boundary separating the schools' attendance areas. . . . " (*Chicago Sun-Times*, September 15, 1981, at p. 3, col. 2)

Each of the actions taken in September 1981, including the re-establishment in modified form of the quota plans at Gage Park and Morgan Park, was taken to comply with the Board's consent decree obligation to create the greatest practicable number of stably desegregated schools while assuring that the burdens of desegregation were not imposed arbitrarily. As the Board reported last month:

> "In summary, the fall 1981 boundary adjustments for desegregation purposes, including both elementary school attendance areas and high school feeder patterns, affected a total of 33 schools, including 16 schools over

> 70% white and 15 schools over 70% minority, the great majority of the latter being predominantly black schools. The adjustments called for the transfer of approximately 1,900 students and sought to affect the desegregation of approximately 15,000 students." (App. 57)

Most recently, on December 31, 1981, the Board released for public comment a 1200-page proposed final plan to implement the consent decree.[1] (App. 41) That document details on a school-by-school basis the complete desegregation plan for the entire system. A fundamental requirement of this proposed final plan is that any school with an enrollment above 70% white must become stably integrated or desegregated (defined as having at least 30% minority enrollment) not later than Fall 1983. (App. 52-53) Significantly, the December 1981 document reveals that, in the first year under the consent decree, the number of such identifiably white schools has been reduced from 81 to 34 as a result of steps already taken. (App. 53)

The proposed plan details actions to be taken next September to further the desegregation that has occurred as a result of the September 1981 implementation. Many of these actions will further affect the operation of the quota plans at Gage Park and Morgan Park and will further alter the allocation of the burdens of desegregation throughout the system. Thus,

> 1. Twenty-four elementary and twelve high schools, including Gage Park, have been paired or clustered and will jointly develop educational programs designed to induce students to transfer to another school within each group. (App. 57-59, 62) One purpose of such "teaming" at Gage Park is to attract additional white students, thereby opening up more space for black students in the school. (App. 62-63)

---

[1] Public hearings on the proposed plan are underway, and the Board will vote on January 18, 1982 on a final version to submit to District Judge Shadur. Selected provisions of the proposed plan are reprinted at App. 41-64.

2. Six new metropolitan high schools have been created to attract students to specialized curricula. (App. 57-60)

3. Six new "scholastic academies" offering a "back to basics" education have been created. (App. 58, 60-61)

4. Fourteen elementary schools and eight high schools, including both Morgan Park and Gage Park, will offer specialty programs not generally available at other schools. (App. 58, 61) Again, the programs at Gage Park and Morgan Park are intended to attract additional white students into these schools, thereby permitting more black students to enroll. (App. 61)

At each of the new schools described above, admissions will be determined on the basis of race in order to create and maintain an integrated education for as many students as practicable. As the Superintendent reported, under the December 1981 proposed plan, 116,000 students will be in desegregated programs in Chicago public schools. (*Chicago Tribune*, January 1, 1982, at p. 1, col. 3)

Thus, the setting within which the quota plans operate today differs markedly from that in 1976, when petitioners argued that only blacks were being reassigned and that the Board had made no effort to integrate predominantly white schools.

REASONS FOR DENYING THE WRIT

I.

THE CONSENT DECREE AND DESEGREGATION PLAN HAVE RENDERED THIS ACTION MOOT OR OTHERWISE INAPPROPRIATE FOR REVIEW

On remand from this Court, the Court of Appeals held that because quota plans still exist at Gage Park and Morgan Park, petitioners' 1976 action is not moot. Like the Petition, the Court of Appeals opinion did not address respondents' principal contention that the 1976 action is moot because the quotas exist today in a dramatically different factual and legal setting.

Petitioners allege that in 1976 the only Chicago students deprived of the "right" to attend neighborhood schools were blacks in the Gage Park and Morgan Park attendance areas. Whatever the validity of their challenge to the quotas in 1976, the fact is that today no student in Chicago has an unqualified "right" to attend a neighborhood school. That right is entirely dependent on whether the student's attendance will enhance desegregation or maintain integration. If it will, the student may attend, and if it will not, the student is subject to mandatory reassignment, regardless of race. Indeed, a school may be "taken away" from a racially homogenous neighborhood and given to the entire city so as to attract students of all races and ethnic groups.

This new constitutional context moots the litigation. The constitutional issue presented by petitioners' complaint—the isolated use of racial quotas at two schools so as to exclude only blacks—has "lost its character as a present, live controversy." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam). *See also Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568 (1947). The record developed below relates exclusively to the admissions quotas as they existed prior to the consent decree and prior to the formulation and ongoing implementation of the system-wide desegregation plan. The record does not include facts crucial to the issue petitioners seek to litigate for the first time in this Court—the constitutionality of using racial quotas in a system-wide desegregation plan. Indeed, the District Court denied the Board's motion to supplement the record with evidence concerning system-wide desegregation implementation (Pet. App. 40), and the Court of Appeals did not address this issue because of its mistaken view that the constitutionality of excluding some blacks from two schools is entirely independent of whether, "in the system as a whole," the burdens of desegregation are distributed equitably. (Pet. App. 4, 6)

The mootness of this case is further illustrated by an examination of its remedial aspects. Unless this Court were to declare that a school board can *never* take account of race when making student assignments unless it is *forced* to do so

after *contested* litigation resulting in a finding of past discrimination—a far-reaching proposition never passed on by the lower courts—then the most petitioners could hope for is a ruling that the quotas cannot be employed so as to place the burden of desegregation exclusively on blacks.

Yet the quotas are not so employed today, and they cannot be so employed in the future. Blacks in the Gage Park and Morgan Park attendance areas, like all students in the Chicago public schools, are already the beneficiaries of a judicially-enforceable consent decree guaranteeing that the burdens of desegregation will not be imposed arbitrarily on any racial or ethnic group. Consequently, there is no "reasonable expectation that the [Board] will repeat its purportedly unauthorized actions." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Review of this case accordingly would be inappropriate under the well-recognized principle that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1981). *See A.L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324 (1961).

The entirely new factual setting also militates strongly against a grant of certiorari as a matter of judicial policy. The only arguably live controversy today concerns the permissibility of racial quotas as part of a system-wide desegregation plan, and that issue was never litigated by the parties or addressed in the opinions below. Consequently, this issue is not "so shaped by the record and the proceedings below as to bring [it] before this Court as leanly and as sharply as judicial judgment . . . requires." *Lathrop* v. *Donohue*, 367 U.S. 820, 847 (1961) (quoting *United States* v. *C.I.O.*, 335 U.S. 106, 126 (1948) (Frankfurter, J., concurring)).

Considering the significance of the issue not only to desegregation efforts in Chicago but also to desegregation planning across the country, respondents submit that the Court should not address the issue on the record developed in this litigation. As this Court held in *Sanks* v. *Georgia*, 401 U.S. 144,

152 (1971):

> "The focus of this lawsuit has been completely blurred, if not altogether obliterated, and our judgment on the important issues involved is potentially immaterial. Indeed, the instant case is obviously more compelling than [*United States* v. *Fruehauf,* 365 U.S. 146 (1961)], since this one presents an issue of constitutional, not statutory, interpretation."

II.

THE PROPER FORUM FOR CHALLENGES TO THE BOARD'S DESEGREGATION PLAN IS THE DISTRICT COURT HAVING ONGOING JURISDICTION OVER THE BOARD'S COMPLIANCE WITH THE CONSENT DECREE

Petitioners' challenge is in reality a challenge to one aspect of the Board's desegregation plan. District Judge Shadur has ongoing jurisdiction pursuant to the consent decree to determine the constitutionality of the Board's entire plan, and he has made clear that he will take an active role in protecting the constitutional rights of all persons affected by the Board's desegregation efforts:

> "This Court does *not* view itself as a passive receptacle for the Board's desegregation plan, to respond in a Pavlovian way only if the bell is rung by a stated disagreement between the Board and the United States. It has not abdicated its constitutional responsibilities, and if the litigants were to *agree* on a plan that did not conform to the Constitution this Court would reject that plan and send the parties back to the drawing board. This Court has specifically retained jurisdiction of this action for all purposes under Paragraph 7 of the Consent Decree, by specific agreement of the parties. In this Court's opinion, the provision of Section 18 for resolving any disagreements between the parties cannot and does not *exclude* (expressly or by inference) this Court's right and duty to determine whether the plan meets the requirements of the United States Constitution."

United States v. *Board of Education,* 88 F.R.D. 679, 687 (N.D. Ill. 1981) (emphasis in original; footnotes omitted).

Review of the issues raised by petitioners at this time would result in a piecemeal determination of the constitutionality of the Board's desegregation plan and could create conflicts with Judge Shadur's ongoing jurisdiction to supervise the Board's compliance with the consent decree and the constitutionality of the entire desegregation plan. Any challenges to aspects of the plan should be brought before Judge Shadur, who has the responsibility to assess the overall plan developed by the Board and to determine its constitutionality as a whole.

Petitioners are free to challenge any aspect of the plan before Judge Shadur, and accordingly would not be prejudiced by a denial of the Petition. Because petitioners have a preferable forum available to them, denial would further the general policies against piecemeal litigation and unnecessary constitutional pronouncements. *See generally White* v. *Regester,* 412 U.S. 755 (1973); *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288 (1936).[2]

III.

THE BOARD'S USE OF RACIAL QUOTAS AS ELEMENTS OF A SYSTEM-WIDE DESEGREGATION EFFORT IS CONSTITUTIONAL

Whatever the merits of petitioners' claim that the 1976 quotas were infirm because they excluded only black students from their neighborhood schools, now black and white students alike are subject to various reassignment techniques, including quotas, as part of the Board's system-wide desegregation plan. As noted above, the constitutionality of using quotas in this context is an issue that should be raised before Judge Shadur in the first instance. While this alone warrants a denial of the Petition, another factor counseling against review by this Court is that the sole remaining live

[2] Lower courts have rejected separate challenges to individual aspects of broad desegregation plans when a forum supervising the plan as a whole was available. *See, e.g., Hines* v. *Rapides Parish School Board,* 479 F.2d 762 (5th Cir. 1973).

issue raised by petitioners is insubstantial.

This Court's long struggle with school desegregation makes clear that a school board may use racial quotas in implementing a desegregation plan. "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.'" *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971). *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22-25 (1981). The school desegregation cases also confirm that a school board may *voluntarily* adopt racial quotas as part of a plan to promote integration, and need not use quotas throughout the system. *See McDaniel, supra; Swann*, 402 U.S. at 24.

Petitioners' contention that the racial quotas here are invalid because they were not adopted in response to a finding of a past constitutional or statutory violation (Petition at 20-22) is erroneous. This Court made clear in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), that it is within a school board's authority to prescribe racial quotas without the necessity of a finding of a constitutional violation:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court."

402 U.S. at 16.[3] *See Regents of the University of California* v.

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[3] Petitioners argue *Swann* does not apply here because "the quotas were not adopted as part of an effort to desegregate an entire system," and do not result in each school in the system reflecting the system-wide racial make-up. (Petition at 24 n. *) Petitioners apparently believe that because the Board first adopted quotas prior to the consent decree, the fact they now exist in modified form as one element of the Board's system-

(*footnote continued*)

Bakke, 438 U.S. 265, 362-63 (1978) (Brennan, J., concurring). Moreover, petitioners' argument ignores the fact that these admissions quotas are but one of several actions the Board has taken to fulfill its consent decree obligation "to remedy the present effects of past segregation" and to assure "the greatest practicable number of stably desegregated schools" in Chicago. That consent decree settled a Department of Justice lawsuit alleging that the Board had unlawfully segregated students. Hence, contrary to petitioners' assertion, the Board's use of quotas *is* part of a systematic effort to remedy past segregation.

Fullilove v. *Klutznick*, 448 U.S. 448 (1980), and *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), relied on by petitioners, do not prohibit the Board's use of racial quotas. In *Bakke*, the special admissions program "totally foreclosed" some persons "from enjoyment of a state-provided benefit—admission to the [University of California at Davis] Medical School—they would otherwise receive." 438 U.S. at 305 (Powell, J.). In contrast, the racial quotas at Gage Park and Morgan Park, while maintaining integration at those schools, foreclose no one from obtaining a public school education, or even an integrated public school education. Students excluded from these schools are encouraged, by free bus transportation and other incentives, to attend other integrated high schools nearby. As Justice Powell emphasized, the *Bakke* case was

> "wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education."

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wide desegregation plan can simply be ignored. Moreover, *Swann* makes clear that there is no constitutional requirement that quotas must be used such that every school reflects the system-wide racial make-up. 402 U.S. at 24.

438 U.S. at 300 n.39. Here, the Board has guaranteed students excluded from Gage Park and Morgan Park admission to an alternative integrated school as part of its desegregation effort.

Petitioners' reliance on *Fullilove* is also misplaced. The racial quota involved in *Fullilove* was upheld despite the fact that it necessarily foreclosed some persons from obtaining government contracts. *Fullilove* therefore certainly is not authority for invalidating quotas which have served the remedial purpose of maintaining integration at two schools, without denying anyone the opportunity to attend an integrated school.

Fullilove also confirms that a racial criterion is permissible in the context of a remedial program, even though it may incidentally inconvenience innocent parties. 448 U.S. at 484. Because petitioners have no right to attend a particular school, *McDaniel* v. *Barresi*, 402 U.S. 39, 42 (1971), the inconvenience they suffer in being assigned to alternative integrated schools as an incident of the Board's desegregation plan does not rise to the level of a constitutional violation, particularly because students of all races throughout the school system are now subject to similar inconveniences as part of the Board's desegregation effort.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix

IN THE

United States District Court

FOR THE

NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, *Plaintiff,* vs. **BOARD OF EDUCATION OF THE CITY OF CHICAGO,** *Defendant.*	**CIVIL ACTION NO. 80 C 5124** **COMPLAINT**

The United States, by its attorneys, alleges:

1. This is an action brought by the Attorney General on behalf of the United States to enforce the provisions of Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6; Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*; the regulations of the United States Department of Health, Education and Welfare (now the Department of Education and hereinafter "HEW" with reference to all times before the change) which implement Title VI, 45 C.F.R. Parts 80 and 81; the Fourteenth Amendment to the United States Constitution, and the contractual assurances made by defendant Board of Education of the City of Chicago (hereinafter "Board of Education") in consideration of its continuing receipt of federal financial assistance.

2. This Court has jurisdiction of this action under 28 U.S.C. 1345, under 42 U.S.C. 2000c-6 and under 42 U.S.C. 2000d-1.

3. The Attorney General of the United States has received written complaints signed by parents of children attending schools operated by the Board of Education alleging that their minor children are members of a similarly-

situated class which is being denied the equal protection of the laws by the Board of Education. The Attorney General believes these complaints to be meritorious and has certified that said parents are unable to initiate and maintain appropriate legal proceedings to afford their children and the similarly-situated class appropriate legal redress. Further, the Attorney General has certified that the institution of this action will materially further the orderly achievement of desegregation in the public schools operated by the defendant. Finally, the Attorney General has notified the Board of Education of the complaint and of his determination that the Board of Education is operating in non-compliance with the Equal Protection Clause of the Fourteenth Amendment and with Titles IV and VI of the Civil Rights Act of 1964, and he has certified that the Board of Education and its agents have had a reasonable time to adjust the conditions alleged in the complaint. The certificate of the Attorney General is attached hereto and incorporated herein.

4. The Board of Education is a public body created by the State of Illinois to administer and supervise the public schools within its statutorily-defined area and, under the laws of the State of Illinois, may sue and be sued. S.H.A., Ch. 122, § 34.2. Its principal offices are at 228 North LaSalle Street, Chicago, Illinois.

5. The Board of Education is receiving and at all times material has received federal financial assistance.

6. To qualify for federal financial assistance, the Board of Education submitted Assurances of Compliance with the provisions of Title VI of the Civil Rights Act of 1964 and the HEW regulations promulgated thereunder.

7. On April 9, 1979, HEW notified the Board of Education that under 45 C.F.R. 185.43(d), it was ineligible to receive federal funds distributed under the Emergency School Aid Act, 20 U.S.C. 1601 *et seq.* (hereinafter "ESAA") because its racial segregation of students violated Title VI.

8. On September 17, 1979, HEW informed the Board of Education that HEW would initiate the referral of this matter to the United States Department of Justice in one

month if, by then, the Board of Education had not rebutted or explained HEW's findings that the Board of Education was in violation of Title VI and had not developed a plan to remedy its unlawful discrimination.

9. On October 17, 1979, HEW received a letter from the Board of Education's General Superintendent, Dr. Joseph P. Hannon, who, writing on behalf of the Board of Education, specifically denied that it had violated the Fourteenth Amendment to the Constitution, the Civil Rights Act of 1964, as amended, or decisions of courts interpreting the same.

10. On October 18, 1979, the Director of HEW's Office for Civil Rights notified the Board of Education that HEW would refer the case against it to the Department of Justice unless the Board of Education submitted an acceptable desegregation plan within ten (10) days.

11. The Secretary of HEW received no acceptable plan from the Board of Education by October 28, 1979, and determined that the Board of Education would not comply voluntarily with the provisions of Title VI and the Assurances referred to in paragraph 6, above.

12. On October 29, 1979, the Secretary of HEW referred this matter to the Department of Justice, requesting that the Department take appropriate legal action to secure compliance by the Board of Education with Title VI and said Assurances.

13. The Board of Education applied for ESAA funding for the 1980-81 school term. HEW again found the Board of Education ineligible for funding because the Board of Education had unlawfully segregated students on the basis of race. Following a presentation of facts by the Board of Education in defense of its actions, these HEW determinations were reaffirmed by the Department of Education on June 12, 1980.

14. Current racial segregation of students in the public schools operated by the Board of Education has been caused, in substantial part, by the actions and omissions of the defendant.

15. Specific practices of the Board of Education which

have unlawfully segregated students on the basis of race and ethnic origin (Hispanic) include, but are not limited to, the following:

(a) The drawing and alteration of school attendance area boundaries in such a way as to create, maintain or increase racial or ethnic segregation of students;

(b) The adjustment of grade structures among schools so as to create or maintain racial or ethnic segregation;

(c) The maintenance of racially and ethnically segregated branches of schools;

(d) The placement of permanent and temporary facilities to relieve student overcrowding and the failure to use alternative, educationally sound measures to relieve student overcrowding so that, by action and omission, racial and ethnic segregation of students was created and maintained;

(e) The maintenance of a racially-disproportionate number of severely overcrowded and thereby educationally inferior schools in such a way as to identify, in conjunction with the practices described in the next two subparagraphs, those schools as intended for black students and less crowded schools as intended for white students;

(f) The assignment of teachers and staff to schools in such a way as to match the race of the faculties with the race of the students attending the schools;

(g) The employment of a permissive transfer policy which allowed white students to avoid attending their schools of assignment when their race was in the minority in favor of attendance at other schools where their race constituted the majority of student enrollment; and

(h) The association of segregated schools with segregated housing projects.

16. The practices listed in Paragraph 15, above, occurred over a substantial period of time and in a substantial portion of the Chicago public schools, and constitute a system-wide violation of the Constitution and the laws of the United States.

17. Unless restrained by order of this Court, the Board of Education will continue to maintain and operate the Chicago public schools in violation of the Constitution and laws of the

United States, resulting in immediate, severe and irreparable harm. No adequate remedy is available at law.

WHEREFORE, plaintiff, United States of America, prays that this Court enjoin defendant, its agents, employees and all persons in active concert or participation with it from discriminating against pupils on the basis of race and ethnic origin and from failing to operate said school system lawfully, by implementing such plan of desegregation as this Court may order.

Plaintiff further prays this Court to grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

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IN THE

United States District Court

FOR THE

NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, *Plaintiff,* vs. **BOARD OF EDUCATION OF THE CITY OF CHICAGO,** *Defendant.*	NO. 80 C 5124

CONSENT DECREE

1. The United States has filed a complaint alleging that the Board of Education of the City of Chicago (the "Board") has engaged in acts of discrimination in the assignment of students and otherwise, in violation of federal law. The United States alleges further that such acts have had a continuing system-wide effect of segregating students on a racial and ethnic basis in the Chicago public school system.

2. In addition, the United States Department of Health, Education and Welfare ("HEW") in 1979 and in 1980 found the Board ineligible for funding under the Emergency School Aid Act on the basis of its determinations that the Chicago public school system is characterized by racially segregated and over-crowded schools. Following a presentation of facts by the Board in defense of its actions, these HEW determinations were reaffirmed by the Department of Education on June 12, 1980.

3. The Board neither admits nor denies the allegations of the complaint in this action. It recognizes, however, that the Chicago public school system is characterized by substantial

racial isolation of students.

4. The Board believes that racial isolation is educationally disadvantageous to all students and that educational benefits will accrue to all students through the greatest practicable reduction in the racial isolation of students.

5. The Board believes that litigation of this action would require a substantial expenditure of public funds and a substantial commitment of Board and staff time and resources, at a time when financial and personnel resources are already greatly limited, and that such resources can more appropriately be used to achieve the educational goals of the school system. The parties further believe that litigation of this action would be protracted and that settlement of the action is in the public interest.

6. In light of these considerations, the parties, as indicated by the signatures of their counsel below, have determined to settle this action and resolve the United States' request for injunctive relief by entry of this consent decree. The parties submit to the jurisdiction of the Court and acknowledge that subject matter jurisdiction exists over this action under the Fourteenth Amendment of the United States Constitution; under Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. 2000c and 2000d; and under 28 U.S.C. Sec. 1345. The Board waives the notice provisions of those acts. Both parties waive the entry of findings of fact and conclusions of law. Each party shall bear its own costs.

7. Both parties agree that this Consent Decree is final and binding as to the issues resolved herein. The Court shall retain jurisdiction of this action for all purposes, until a final order is entered terminating this litigation.

8. In the event that objections or challenges are raised (e.g., through intervention or separate collateral lawsuits) to the lawfulness or appropriateness of (a) this decree, any provision hereof, or proceedings pursuant hereto, or (b) any aspect of the desegregation plan provided for in Part I hereof after approval of the plan by the Department of Justice or by the Court, the Board and the Department of Justice shall defend the lawfulness and appropriateness of the matter

challenged. If any such collateral lawsuit arises in state court, the parties shall seek to remove such action to the U.S. District Court.

WHEREFORE, the parties having freely given their consent, the terms of the Decree being within the scope of the complaint, and the terms of the Decree being fair, reasonable and adequate, it is hereby ORDERED, ADJUDGED, and DECREED that:

I. STUDENT DESEGREGATION

1. *Systemwide Remedy.* The Chicago Board of Education (the "Board") will develop and implement a system-wide plan to remedy the present effects of past segregation of Black and Hispanic students.
2. *Basic Objectives.*
   - 2.1 *Desegregated Schools.* The plan will provide for the establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago.
   - 2.2 *Compensatory Programs in Schools Remaining Segregated.* In order to assure participation by all students in a system-wide remedy and to alleviate the effects of both past and ongoing segregation, the plan shall provide educational and related programs for any Black or Hispanic schools remaining segregated.
   - 2.3 *Participation.* To the greatest extent practicable, the plan will provide for desegregation of all racial and ethnic groups, and in all age and grade levels above kindergarten.
   - 2.4 *Fair Allocation of Burdens.* The plan shall ensure that the burdens of desegregation are not imposed arbitrarily on any racial or ethnic group.
3. *Board Discretion in Plan Development.*
   - 3.1 *Board Discretion in Selecting from Alternatives.* The Department of Justice recognizes that there is a broad range of constitutionally acceptable plans that will fulfill the basic objectives stated in

Part 2. The Department of Justice further recognizes the Board's familiarity with and sensitivity to the unique situation presented in Chicago, and the authority of the Board, in its discretion, to select from within the constitutional range the plan that best meets the needs of the Chicago School District.

3.2 *Racial/Ethnic Balance of Specific Ratios Not Required.* The parties recognize that courts have not required specific racial ratios in schools as a necessary remedy in desegregation cases, that racial and ethnic balance throughout the Chicago School District is neither practicable nor required, and that no particular definition of a desegregated school is required.

4. *Techniques.* In establishing desegregated schools, the Board may use the following techniques, among others:

4.1 *Voluntary Techniques.*

4.1.1 Permissive transfers that enhance desegregation, with transportation at Board expense.

4.1.2 Magnet schools that enhance desegregation.

4.1.3 Voluntary pairing and clustering of schools.

4.1.4 If magnet schools or other voluntary techniques are used, each shall contain racial/ethnic goals and management controls (e.g., an alternative that would require mandatory re-assignments) to ensure that the goals are met.

4.2 *Mandatory Techniques Not Involving Transportation.*

4.2.1 Redrawing attendance areas.

4.2.2 Adjusting feeder patterns.

4.2.3 Reorganization of grade structures, including creation of middle schools.

4.2.4 Pairing and clustering of schools.

4.2.5 Selecting sites for new schools and selecting schools for closing to enhance integration.

4.3 *Mandatory Reassignment and Transportation.* Mandatory reassignment and transportation,

at Board expense, will be included to ensure success of the plan to the extent that other techniques are insufficient to meet the objective stated in Sec. 2.1. The plan may limit the time or distance of mandatory transportation to ensure that no student shall be transported for a time or distance that would create a health risk or impinge on the educational process. These limitations may vary among different age and grade levels.

4.4 *Priority and Combination of Techniques.* The plan may rely upon the techniques listed above and any other remedial methods in any combination that accomplishes the objective stated in Sec. 2.1.

5. *Exceptions.*

5.1 *Justification for Remaining Identifiable Minority Schools.* With respect to any schools that remain identifiable as Black or Hispanic schools, the plan shall provide specific justification in terms of practicability (i.e., educational or practical considerations), in the context of the extent to which the plan as a whole achieves the objectives stated in Part 2.

5.2 *Stably Integrated Schools.* The plan may create exceptions with respect to individual schools which it shows are already stably integrated (or will become stably integrated by the time of implementation of the plan).

5.2.1 *Initial Exception.* The plan may exclude such schools from reassignment of students if the extent of integration is within a reasonable range of that to be achieved in the schools referred to in Sec. 2.1.

5.2.2 *Subsequent Exception* The plan may provide for the later exclusion from student reassignment of any initially included school that, through demographic changes or other factors, promises to become stably integrated.

5.2.3 *Subsequent Inclusion.* The plan should include sufficient flexibility to enable any of the

techniques outlined above to be applied to any school in which stability of integration is threatened by unforeseen circumstances.

6. *Bilingual Education.* The Board's legal obligations to provide bilingual education for non- and limited-English speaking students shall be discharged in a manner consistent with the overall objectives of the plan. To the extent that students who require bilingual education are reassigned, they shall not be reassigned in a manner that interferes with their participation in bilingual programs.
7. *Compensatory Programs in Schools Remaining Segregated.* To accomplish the objective stated in Sec. 2.2, the plan will include specific programs for Black or Hispanic schools remaining segregated, in the following areas among others:
   - 7.1 Remedial and compensatory educational programs.
   - 7.2 Improved curricula and instructional and evaluative techniques (including the utilization of tests that validly measure student achievement) for academic, vocational and alternative educational studies.
   - 7.3 Pre-service and in-service instruction for administrators, principals, teachers and other school personnel.
   - 7.4 Selection, and evaluation of the performance of, principals and supporting leadership staff.
   - 7.5 Testing, counseling, guidance and student welfare.
   - 7.6 Physical facilities, safety and security.
   - 7.7 Supportive relationships between such schools and groups and institutions in the community and in government.
8. *Overcrowding.* The Board is encouraged but not required to eliminate overcrowded schools. The plan should provide, to the greatest extent practicable considering all the circumstances, for the elimination of racially disproportionate overcrowding of classrooms and school sites.

9. *Discipline.* The plan shall include provisions to ensure that discipline is administered in a non-discriminatory manner.
10. *Resegregation.* The plan shall contain provisions to ensure against resegregation of students after implementation, in the following areas:
    10.1 *In-School.* The plan shall include provisions to ensure that students attending desegregated schools are not resegregated within their schools without adequate educational justification. This provision shall apply to the assignment of students to classrooms as well as to programs of instruction.
    10.2 *Student Reassignment.* The plan shall include provisions to ensure that students shall not be reassigned in a manner that, considering the district as a whole, causes the resegregation of schools.
    10.3 *Structural adjustments.* The plan shall include provisions to ensure that site selections, construction, school closings, readjustments of attendance areas and feeder patterns, and new placement of mobile classrooms shall be accomplished so as not to cause the resegregation of schools.
    10.4 *Educational Program Adjustments.* The plan shall include provisions for utilization in desegregated schools of such of the specific programs referred to in Part 7 hereof as the Board concludes are necessary to ensure against resegregation of such schools.
11. *Facilitating Success of the Desegregation Process.*
    11.1 *Community Involvement.* The plan will establish programs to promote public involvement with and support for the desegregation process.
    11.2 *School Personnel.* The plan will provide for preservice and in-service training programs for Board personnel such as administrators, teachers, auxiliary staff, bus drivers and monitors.
    11.3 *Other Institutions.* The Board shall endeavor to involve in the desegregation process state and local

government, private businesses, colleges and universities, civic and community organizations, labor unions, professional organizations, religious and cultural institutions, the parochial school system and other private schools.

12. *Voluntary Interdistrict Pupil Transfers.* The plan will include provisions, including without limitation the payment of transportation costs, to encourage and facilitate voluntary interdistrict pupil transfers having integrative effects between schools in the Chicago School District and schools in other districts in the Chicago Standard Metropolitan Statistical Area ("SMSA").
13. *Reporting.* The plan shall establish a system of record-keeping and reporting through which the Board's compliance with the provisions of this agreement can be monitored.
14. *Flexibility.* The parties to this agreement recognize that neither the principles set forth above nor the desegregation plan can provide for every contingency and that exceptions will be necessary. The burden is on the Board, however, to justify such exceptions on the basis of educational and practical considerations.
15. *Financial Cost of the Plan.*
    15.1 Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.
    15.2 Each party reserves the right to seek to add additional parties who may be legally obligated to contribute to the cost of the desegregation plan.
    15.3 The parties recognize that financial cost of implementation does not excuse the failure to develop a desegregation plan consistent with the principles set forth in Sections 2-14, and is not a basis for postponement, cancellation or curtailment of implementation of the plan after it has been finally adopted, but is one legitimate consideration of practicability in meeting the objective stated in Sec. 2.1.

16. *Time table.* The plan will be developed in accordance with the schedule set forth in Attachment A and will be implemented beginning with the 1981-82 school year.
17. *Public Participation.* The Board will receive and consider comments and recommendations from all persons and groups during the development of the desegregation plan.
18. *Resolution of Disagreements.* If the parties to this decree are unable to agree as to whether the desegregation plan is consistent with the principles set forth above in Sections 2 through 15, the disagreement will be submitted to the court for resolution.

II. ADDITIONAL PROGRAMS AND PARTIES

1. *Interagency Coordination.* The Department of Justice agrees that it will, pursuant to the Attorney General's authority (including that under Executive Order 11764 to coordinate the enforcement of Title VI of the Civil Rights Act of 1964), initiate and carry forward discussions with other agencies of the federal government to bring about a coordinated affirmative administration of federal grant programs in the Chicago SMSA with the goal of contributing to the creation and maintenance of stably integrated schools in the Chicago SMSA. These federal programs include, for example, housing, employment and transportation in addition to education.
2. *State Responsibility.*
   2.1 The Department of Justice will thoroughly pursue and promptly complete its investigation of whether the State of Illinois should be made a party defendant and be required to assist and support, financially and otherwise, the implementation of the desegregation plan discussed in Part I. The investigation will examine whether the State and/or its agencies have contributed, through action and inaction, to the segregation of, or other discrimination against, students in the Chicago School District.

2.2 Upon completion of the investigation the Department will submit the factual findings thereof to the Court and, if warranted by the results of the investigation, promptly take such enforcement action as is appropriate under the circumstances, consistent with the Attorney General's responsibilities under Title IV of the Civil Rights Act of 1964.

3. *Interdistrict Remedies.*

3.1 The Department of Justice will thoroughly pursue and promptly complete its examination of the extent to which interdistrict remedies for segregative conditions in schools in the Chicago school district may be appropriate, including (without limitation) by reason of the possibilities that:

3.1.1 The State of Illinois together with school districts in the Chicago SMSA, or some of them, may have acted in effect as a metropolitan school district with respect to vocational, special and other educational programs; and

3.1.2 The State of Illinois together with State housing agencies and other agencies of state government, including units of local government in the Chicago SMSA, or some of them, may have contributed to the segregation of the races in the Chicago SMSA by racially discriminatory use of state or federal housing laws or programs, or of state or local land use control laws.

3.2 Upon completion of the investigation, the Department will submit the factual findings thereof to the Court and will take whatever enforcement action is appropriate under the circumstances, consistent with the Attorney General's responsibilities under Title IV of the Civil Rights Act of 1964.

4. *LEAA Grant Condition.* The Department of Justice agrees that the entry of this consent decree is a sufficient basis for the removal, from the grant awarded by the Law Enforcement Assistance Administration to the

Board on September 10, 1980, (¶80-JS-AX-0043), of the condition relating to Title VI of the 1964 Civil Rights Act and Sec. 815 of the Criminal Justice Improvement Act of 1979.

III. OTHER ISSUES

1. *Classroom Segregation.* The Board will promptly implement a plan to ensure that no student is assigned to a racially/ethnically isolated or identifiable classroom except when the assignment is justified educationally. The plan will be consistent with the Board's application for a waiver of ineligibility for funding under the Emergency School Aid Act ("ESAA") for fiscal year 1979, which was found acceptable by the Department of Health, Education and Welfare ("HEW") and is presently acceptable to the Department of Education.
2. *Bilingual Programs.* The Board will promptly implement a plan to ensure that non- and limited-English speaking students are provided with the instructional services necessary to assure their effective participation in the educational programs of the Chicago School District. The plan will be consistent with the Board's application for a waiver of ineligibility for funding under ESAA for fiscal year 1979, which was found acceptable by HEW and is presently acceptable to the Department of Education.
3. *Faculty Assignment.* The Board will promptly implement a plan to assure that the assignment of full-time classroom teachers to schools will be made in such a manner that no school is identified as intended for students of a particular race, color or national origin. Except as specifically provided herein, the plan shall be consistent with the Board's application for a waiver of ineligibility for funding under ESAA for fiscal year 1979, which was found acceptable by HEW and is presently acceptable to the Department of Education.

   3.1 Not later than November 1, 1981, with respect to the full-time classroom teachers in each school faculty, the racial/ethnic composition and the pro-

portion of experienced teachers will be between plus and minus fifteen percent of the system-wide proportions of such teachers with respect to such characteristics, and the range of educational training will be substantially the same as exists in the system as a whole.

3.2 The Board will make every good faith effort to follow professional staff assignment and transfer practices which, when taken together as a whole on a frequently reviewed periodic basis, will assure that the racial composition, the experience and the educational background of individual school faculties and administrative staff more nearly approach[1] the city-wide proportions of minority, experienced, and more extensively trained professional staff; provided, however, that nothing in this plan shall require the assignment or transfer of any person to a position for which he or she is not professionally qualified. The Board will not adopt or follow assignment and transfer practices which will foreseeably result in the racial identifiability of schools based on faculty or administrative staff composition or in unequal distribution of experienced and more extensively trained staff.

3.3 The failure of a particular school or schools to meet the guidelines will not constitute noncompliance with the above guidelines if the district provides a detailed satisfactory explanation justifying such failure to meet the guidelines.

September 24, 1980
Date

ENTER:

s/ MILTON I. SHADUR
UNITED STATES DISTRICT JUDGE

[1] Plus or minus ten percentage points of city-wide averages for race, experience and training for each type of school facility.

THE UNDERSIGNED CONSENT TO THE ENTRY OF THIS DECREE:

s/ DREW S. DAYS III
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STUDENT DESEGREGATION PLAN FOR THE CHICAGO PUBLIC SCHOOLS

PART II

STUDENT ASSIGNMENT PRINCIPLES

FINANCIAL ASPECTS

GENERAL POLICIES CONCERNING THE DESEGREGATION PLAN

April 29, 1981

This Part II accompanies the *Student Desegregation Plan for the Chicago Public Schools: Recommendations on Educational Components,* adopted by the Chicago Board of Education on April 15, 1981.

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FINANCIAL ASPECTS

GENERAL POLICIES CONCERNING THE DESEGREGATION PLAN

STUDENT ASSIGNMENT PRINCIPLES

To assure an equal non-separate school system, the Board of Education of the City of Chicago (the "Board") adopts these Student Assignment Principles, all pursuant to the Consent Decree in this case, and as part of the process of developing a complete student desegregation plan. These Student Assignment Principles shall govern the assignment of students in the Board's schools.

The various requirements and provisions set forth in the Consent Decree (other than the provisions dealing with time requirements) shall govern all aspects of the Principles.

1. Definitions

1.1 *Stably Integrated Schools.* The Board will create, preserve, and exempt from mandatory reassignment, schools identified as stably integrated.

1.1.1 A school may initially (by December 31, 1981) be identified by the Board as stably integrated if its enrollment is 30-70% white, or 30-70% minority, and has some history of stability or has become stable.

1.1.2 The Board may later add a school to the category of stably integrated, and exempt it from mandatory reassignment, if through demographic or other factors the school becomes or promises to become stably integrated.

1.1.3 The Board may remove a school from the category of stably integrated, and apply mandatory reassignment techniques to the school, if stability of integration is threatened.

1.1.4 A voluntary transfer student will be regarded as a member of the receiving school for the purposes of determining whether a school is stably integrated.

1.2 *Desegregated Schools.* A desegregated school is one in which the Board establishes, by any assignment technique, an enrollment of 30-70% white, or 30-70% minority.

2. Voluntary Techniques

2.1. *Voluntary Transfers.* The Board will adopt affirmative programs of student transfers (with transportation provided as appropriate) in which participation is not compulsory for students.

2.1.1 The Board will encourage, promote and assist voluntary transfers in view of the desirability of voluntary desegregation techniques, the large number of schools remaining predominantly Black, Hispanic and/or overcrowded, and the legal precedent supporting such transfers.

2.1.2 Any student desiring to transfer has the right to do so, subject to § 5, if the transfer will enhance integration/desegregation at the receiving school and not adversely affect it at the sending school.

2.1.2.1 Any student who meets the foregoing criterion will be permitted to transfer to the school of the student's choice, within the physical and program capacity and admission requirements (if any) of the school.

2.1.2.2 Without limiting the preceding paragraph, the Board will promote voluntary transfers by establishing administrative systems involving sending and receiving schools or zones or a similar procedure. In doing so, the priority among sending schools will be schools that are overcrowded and schools that are more than 70% Black and/or Hispanic or more than 70% white. The priority for receiving schools will be schools more than 70% white or more than 70% Black and/or Hispanic.

2.1.3 The Board will provide transportation, or reimbursement of the cost of transportation, for voluntary transfer students where the distance from home to school is more than 1½ miles. The Board reserves the discretion to determine when actual

transportation or reimbursement of the cost of public transportation will be provided.

2.2. *Magnet Schools.* The Board will implement magnet schools pursuant to Part B(3) of the Educational Components. Magnet schools shall contain racial/ethnic goals and management controls to ensure that their racial/ethnic composition achieves integration/desegregation at a level of 15-35% white (65-85% minority) by September, 1982, with respect to entering grades, and with respect to other grades to the extent the goal can be achieved without excluding students presently enrolled.

3. Attendance Area and Feeder Pattern Adjustments

3.1 The Board will determine and implement systemwide adjustments of elementary attendance areas and high school feeder patterns that will:

3.1.1 Achieve the greatest practicable degree of integration/desegregation; and

3.1.2 Relieve overcrowding, reduce or eliminate the use of mobile units, and/or make the geographic organization of the school system more efficient.

3.2 After making the initial set of adjustments, the Board will annually review, and periodically make further adjustments of, attendance areas and feeder patterns to achieve these objectives.

4. Phased Implementation of Student Assignment

4.1 The Board will develop a comprehensive student assignment plan, based upon the principles here adopted, on the planning schedule set forth in § 9. The plan will take into consideration the factors identified in § 8. The plan will be implemented in three phases.

4.2 *Phase I.* Phase I will be implemented beginning in September 1981 and continuing indefinitely thereafter. Phase I will include voluntary techniques (voluntary transfers and magnet schools), and will also include adjustments of attendance areas and feeder patterns to the greatest practicable extent.

4.3 *Phase II.* Phase II will be implemented in September 1982. It will include further implementation of voluntary techniques, any attendance area and feeder pattern adjustments that could not practicably be implemented in September 1981, and other practicable mandatory techniques not involving transportation, such as contiguous pairs.

4.4 *Progress Requirement for Predominantly White Schools.* During Phase I and Phase II, any school which had a white enrollment in excess of 70% as of October 1980 shall be required to become a stably integrated or desegregated school not later than fall 1983, and to make substantial progress toward that goal in each preceding year beginning in school year 1981-1982. Substantial progress shall be considered as having been made only if the difference between the October 1980 white enrollment percentage for the school and the 70% figure is reduced by at least ⅓ (or 5% of enrollment, whichever is greater) by school year 1981-82, by at least ⅔ (or 10% of enrollment, whichever is greater) by school year 1982-1983, and is eliminated by the fall of 1983. The Board will establish affirmative methods or programs specifically directed to each school that fails to meet this progress requirement (such as designating the school a special receiving school for voluntary transfers), and will annually report to the Court identifying such schools and the steps being taken with respect to them.

4.5 *Phase III.* The Board recognizes the provision of the consent decree (§ 4.3) that:

> Mandatory reassignment and transportation, at Board expense, will be included to ensure success of the plan to the extent that other techniques are insufficient to meet the objective stated in § 2.1.

The Board determines, however, that this technique is to be used only if other techniques prove to be insufficient, in its determination, to meet the objective of providing

for the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago. Phase III, if it is necessary will include mandatory reassignment involving the use of transportation, to the extent that other techniques have been determined by the Board to be insufficient. The comprehensive student assignment plan will include a contingency plan specifying the conditions under which the Board shall adopt mandatory assignment measures involving the use of transportation, and the extent to which such mandatory assignments shall be employed, in order to achieve the objectives prescribed by the Consent Decree. The contingency plan may provide a reasonable period of time, not to exceed June 1983, to determine the extent to which the other techniques provided herein have succeeded or promise to succeed in achieving the objectives of the Consent Decree.

5. Prevention of Resegregation

5.1 Student reassignments and transfers shall be closely scrutinized to ensure that they do not cause the resegregation of schools.

5.2 The Board shall ensure that the placement of school facilities, closing of schools, and readjustment of attendance areas and feeder patterns, are accomplished so as not to cause the resegregation of schools.

5.3 Until the fall of 1984, the Board shall make adjustments in the student assignment plan to preserve the integration/desegregation achieved, where it is threatened by student population changes, to the greatest extent practicable consistent with stability of student assignment and similar factors. Thereafter the Board may make such adjustments in its discretion.

6. Miscellaneous

6.1 *Bilingual Programs.* To the extent that students who require bilingual education are reassigned by the plan, they shall not be reassigned in a manner that interferes

with their participation in bilingual programs.

6.2 *Overcrowded Schools.* The Board will seek to eliminate overcrowded schools, and particularly racially disproportionate overcrowding of schools and school sites, to the greatest extent practicable considering all the circumstances.

6.3 *Kindergarten.* Kindergarten students shall be omitted from mandatory reassignments other than boundary adjustments, and from a school's enrollment in determining its racial/ethnic composition.

6.4 *High School Seniors.* Students entering their last year of high school at a time mandatory reassignments are implemented may elect to remain in their current school or to attend the newly assigned school.

6.5 *Existing Assignment Policies.* Existing student assignment principles, to the extent inconsistent with the policies here adopted, are superseded. The General Superintendent and Board Attorney are directed to study all existing policies to identify any inconsistencies, and to present appropriate recommendations to the Board.

7. Financial Cost

7.1 The Board notes the provision of the Consent Decree (§ 15.3) that financial cost "is one legitimate consideration of practicability" in meeting student assignment objectives, and also notes the obligation of the Board and of the United States (§ 15.1) "to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan."

7.2 The Board will determine the costs associated with the various potential elements of a student assignment plan, and the extent to which these costs can practicably be met from existing resources or new funding. The plan will not be final (Consent Decree § 15.3) until the plan development process, financial assessment, search for necessary new funds, and ultimate determination of

practicability, is complete.

7.3 With respect to both voluntary and mandatory transportation, the Board adopts these student assignment principles in reliance upon Chapter 122, Article 29, Illinois Revised Statutes, providing for reimbursement by the State of the transportation costs of school districts, and expects the State of Illinois to preserve and to fully fund that statute.

8. Continued Development of a Comprehensive Student Assignment Plan

8.1 The Board will continue to formulate a comprehensive student assignment plan, within the context of the basic principles adopted by § 1-7, on the time schedule stated in § 9. This planning process shall address the refinement, implementation and coordination of all student assignment policies and techniques, both voluntary and mandatory.

8.2 The additional matters that must be addressed by the further student assignment planning process include:

8.2.1 *Sufficiency of Techniques.* Determination of the extent to which various student assignment techniques have been and promise to be sufficient to meet the objectives of the Consent Decree.

8.2.2 *Special Programs.* Analysis of the impact of student reassignment upon special programs, and of the appropriate meshing of the two, including without limitation:

8.2.2.1 Bilingual education programs

8.2.2.2 Special education programs

8.2.2.3 Existing and future magnet schools and programs

8.2.2.4 Voluntary transfer programs

8.2.2.5 Title I ESEA and similar specially-funded programs

8.2.3 *Grade Structure and Curriculum.* Determination of the grade structure and curriculum structure that should be established in any pair or cluster of

schools, including the basic policy determination whether or not to adopt a split elementary grade structure.

8.2.4 *Quality Educational Programs.* Identification of educational programs, curriculum and options for desegregated schools, with the objective of providing to reassigned students an educational program equal to or better than their former school.

8.2.5 *High Schools.* Determination of the appropriate high school assignment pattern, continuity policy, assignment techniques and program modifications.

8.2.6 *Transportation Study.* Performance of a routing and transporation study to the extent necessary to provide a data base from which the Board can determine such matters as time/distance, identification of which students can walk to school and which would require transportation, policy on point-to-point versus route transportation, and acquisition of the necessary transportation capacity.

8.2.7 *Faculty Assignment.* Determination of the proper relationship between student reassignment and the faculty reassignment called for under § III(3) of the Consent Decree.

8.2.8 *Physical Modifications.* Study of necessary physical modification of school facilities to accomodate new student bodies and educational programs.

8.2.9 *Student Population Changes.* Determination of the impact of changes in student populations that have occurred since the October 1980 racial/ethnic survey, and that will occur by the time of implementation of various elements of the plan, including the following factors:

8.2.9.1 Demographic change.

8.2.9.2 Permissive transfers and open enrollment.

8.2.9.3 Identification by the Board of additional stably integrated schools.

8.2.9.4 Magnet schools and programs.

8.2.10 *Equity and Effectiveness of Techniques.* Review of

previous student assignment recommendations, in light of the matters set forth in these principles. This review will include the question of consistency of the recommendations with respect to various geographic areas of the city, and the question whether greater involvement of black students can be achieved.

8.2.11 *Financial Cost.* The financial cost analysis required by § 7.

9. Schedule for Student Assignment Planning

The Board will develop a comprehensive student assignment plan on the following time schedule:

	TASK	INITIATED	COMPLETED
9.1	Identify sites for new magnet schools, Community Academies, and expansion of current programs	4/29/81	5/15/81
9.2	Complete basis planning for all new magnet schools to be opened in September 1981, including programmatic focus, provisions for accomodating students with special needs, facility modification, etc.	4/29/81	6/15/81
9.3	Complete planning for increased utilization of voluntary programs (including magnets, permissive transfer, open enrollment, etc.), including staff selection and training, development of materials for release to the public, appropriate timetables, administrative staff responsibilities.	4/29/81	6/1/81
9.4	Develop strategies to recruit students from schools to be closed for financial reasons, schools that are overcrowded, and other schools into voluntary programs (permissive transfer, open enrollment, magnets)	4/29/81	6/15/81

	TASK	INITIATED	COMPLETED
9.5	Preparation activities for new and existing magnet schools and other voluntary programs including staff selection and training, dissemination of information, preparation of facilities, etc.	5/15/81	9/1/81
9.6	Student enrollment in all voluntary programs	6/1/81	10/30/81
9.7	Develop a computerized student attendance reporting system	4/29/81	6/15/81
9.8	Assess possible changes in current elementary attendance boundaries and high school feeder patterns, including: —1 mile radius analysis (1½ miles for upper and middle grade students) —comparison of capacities of contiguous schools —student locator spot maps —assess natural barriers —determine boundary changes that are practicable for September 1981 —establish new assignments for affected students —notify parents and students of the change	4/29/81	6/15/81
9.9	Assess relationship of student assignment changes to other planning considerations noted in § 8 and make necessary adjustments	6/15/81	9/1/81
9.10	Assess staff, supply and other resource implications of the recommended changes in assignment and develop strategies to accomodate same	6/15/81	9/1/81
9.11	Implement changes in attendance areas and feeder patterns to the extent practicable	9/81	

	TASK	INITIATED	COMPLETED
9.12	Establishment of detailed guidelines for student assignment planning by the Board, pursuant to the principles and the planning considerations identified in § 8	4/29/81	10/30/81
9.13	Assess impact of voluntary efforts and conduct full racial/ethnic student attendance survey to serve as the data base for non-voluntary student assignment planning	10/30/81	11/30/81
9.14	Prepare comprehensive student assignment plan	10/30/81	12/31/81

81-103-12 May 13, 1981

TRANSFER OF STUDENTS FROM GAGE PARK AND MORGAN PARK HIGH SCHOOL ATTENDANCE AREAS

RECOMMENDATION: Students residing in the attendance areas for Gage Park and Morgan Park high schools who are not selected by the lottery system to attend these high schools will be eligible to attend selected receiving high schools.

DESCRIPTION: Once students are accepted by a receiving school, they are to be considered members of that school's regular student body and are not unilaterally transferrable. A program to stabilize the Gage Park area by specifying enrollment ceilings and racial quotas was established in 1976. These programs have proved to be successful, as is indicated by the following membership trends:

Gage Park High School
(including branch membership)

Year	Membership	% White	% Black	% Hispanic	% Other
1973	2,680	49.4	42.7	7.4	.5
1974	2,817	43.4	48.3	8.0	.3
1975	2,535	40.8	48.6	9.9	.7
1976	2,229	41.9	46.3	11.3	.5
1977	2,100	42.0	46.0	11.0	1.0
1978	2,078	43.0	46.3	10.2	.5
1979	1,884	37.2	50.5	12.2	.1
1980	1,557	42.6	46.8	9.9	.7

Morgan Park High School

Year	Membership	% White	% Black	% Hispanic	% Other
1973	3,221	42.8	55.8	.9	.5
1974	3,479	39.6	59.1	.8	.5
1975	3,423	36.9	62.3	.7	.1
1976	2,911	38.2	61.1	.5	.2
1977	2,583	38.7	60.0	.8	.5
1978	2,270	40.7	58.1	.8	.4
1979	2,049	42.0	57.2	.7	.1
1980	2,024	38.1	61.2	.5	.2

Students who choose to take advantage of this program will be transported from a convenient point in their residential area to the receiving school and brought back at the end of the school day. Transportation will be provided by contracted vehicles.

SUPPORTIVE DATA: *Participation*

The number of students identified for transfer to receiving schools will not increase the enrollment of receiving schools beyond 100 percent of their operating capacities based on membership figures as of February 2, 1981, and a 10-period day schedule. During the 1981-82 school year, 300 Gage Park and 200 Morgan Park students were not selected by the lottery system, and will therefore transfer in September 1981.

Students applying for admission to a high school under this program will be given priority after students living in the receiving school's attendance area but before any other students transferring under other option programs.

The following schools are included in this program:

Receiving School	No. of Students Who May Transfer From Gage Park	No. of Students Who May Transfer From Morgan Park
Roosevelt	30	25
Taft	50	—
Mather	30	25
Kennedy	80	60
Hubbard	40	35
Bogan	40	30
Washington	30	25

Students participating in this program may choose to attend any high school designated as a receiving school in the High School Permissive Enrollment Program, as long as their transfer enhance desegregation. The estimated cost for 1981-82 is $400,000.

Since the School Code prohibits the incurring of any liability unless an appropriation has previously been made, the expenditures involved are deemed to be contingent liabilities only subject to appropriation in the 1981-82 budget.

FINANCIAL: No additional cost to the Board at this time.

BOARD OF EDUCATION
City of Chicago
228 North LaSalle Street
Chicago, Illinois 60601

Office of the
President

August 5, 1981

REPORT OF
THE COMMITTEE ON STUDENT DESEGREGATION

TO THE MEMBERS OF THE BOARD OF EDUCATION
OF THE CITY OF CHICAGO:

The Committee on Student Desegregation held consultations with counsel on Monday, July 20; Wednesday, July 22; and Friday, August 7, 1981, at the Board of Education Offices, 228 North LaSalle Street, Room 504.

The Committee reviewed the Student Assignment Principles of the Student Desegregation Plan adopted by the Board of Education on April 29, 1981, specifically:

Section 3.1 The Board will determine and implement systemwide adjustments of elementary attendance areas and high school feeder patterns that will:

3.1.1 Achieve the greatest practicable degree of integration/desegregation; and,

3.1.2 Relieve overcrowding, reduce or eliminate the use of mobile units, and/or make the geographic organization of the school system more efficient.

Section 4.2 *Phase I.* Phase I will be implemented beginning in September 1981, and continuing indefinitely thereafter. Phase I will include voluntary techniques (voluntary transfers and magnet schools), and will also include adjustments of attendance areas and feeder patterns to the greatest practicable extent.

The meeting was adjourned with the understanding that the following Board Reports adjusting attendance areas would be recommended by the Committee on Student

Desegregation and submitted for approval at the next regularly scheduled Board meeting.

District 3

LaSalle, Lincoln and Manierre (Attachment A-1)

Franklin, Ogden, Byrd and Manierre (Attachment A-2)

Districts 4 and 5

Foreman High School, Kelvyn Park High School (Attachment A-3)

Districts 8 and 13

Kelly High School, Tilden High School (Attachment A-4)

Districts 12 and 15

Fleming, Lee, Pasteur, and Peck (Attachment B)

Hubbard High School, Gage Park High School, Harper High School (Attachment C)

Grimes and Hale (Attachment D)

Owen, Carroll, Rosenwald, and Joplin (Attachment E)

Gage Park High School (Attachment F)

Dore (Attachment G)

District 13

Hendricks and Graham (Attachment H)

Districts 15 and 16

Bogan High School, Calumet High School (Attachment I)

District 20

Washington High School, Bowen High School (Attachment J)

Attachments (13)

Respectfully submitted,
Committee on Student Desegregation

s / MRS. MARTHA J. JANTHO
MRS. MARTHA J. JANTHO,
Chairperson

(ABSTAINED) s / MRS. BETTY BONOW
MRS. BETTY BONOW, *Member*

s / DR. LUIS M. SALCES
DR. LUIS M. SALCES, *Member*

Attachment C

ATTENDANCE AREA ADJUSTMENTS HUBBARD HIGH SCHOOL—GAGE PARK HIGH SCHOOL—HARPER HIGH SCHOOL

RECOMMENDATION: That the attendance area adjustments involving Hubbard, Gage Park and Harper high schools be made effective September 1, 1981.

DESCRIPTION: This adjustment is undertaken to implement certain provisions of the Student Desegregation Plan for the Chicago public schools: Recommendations on Part II, Student Assignment Principles, as adopted by the Board of Education on April 29, 1981 (Board Report 81-90-4).

Ninth grade students residing in the Tonti and Sawyer elementary school attendance areas will be transferred from the Hubbard High School attendance area to the Gage Park High School attendance area. This adjustment was made to increase the white membership at Gage Park High School. By increasing the white membership it will also increase the number of minority students eligible through the lottery system.

Ninth grade students residing in the McKay Elementary School attendance area will be transferred from the Harper High School attendance area to the Hubbard High School attendance area. No white students from the McKay attendance area attended Harper High School.

The racial/ethnic composition of the Hubbard High School will be affected by this adjustment. There will be an increase in the minority membership and a decrease in the non-minority membership.

Gage Park (9-12)

Beginning at 49th and G.T. RR
East to Leavitt (Penn RR)
South to 51st Street
East to Wood
North to 50th Street
East to Hermitage
North to Grand Trunk RR (at 49th Street)
East to Ashland
South to 50th Street
East to Racine
South to 61st Street
West to Loomis
South to 62nd Street
West to Laflin
South to 63rd Street
West to Western
South to 65th Street
West to Talman
North to 63rd Street
West to Kedzie
North to 62nd Street
West to Lawndale
North to 61st Street
East to G.T. RR
North to starting point

New Attendance Area Boundaries—Hubbard (9-12)

Beginning at Lockwood (extended) and 55th Street

East to Cicero
South to 56th Street
East to Central Park (Grand Trunk-Western RR)
South to 61st Street
West to Lawndale
South to 62nd Street
East to Kedzie
South to 63rd Street
East to Talman
South to 65th Street
East to Western
South to 69th Street
East to Penn RR
South to C & WI RR (75th Street)
West to Cicero (city limits)
North to 65th Street
West to Lockwood
North to starting point

Harper (9-12)
Beginning at 63rd and Western
East to Laflin
South to 65th Street
West to Ashland
South to 67th Street (Marquette)
East to Loomis
South to 68th Street
East to Throop
South to 71st Street
West to Ada
South to 73rd Street
West to Loomis
South to 75th Street (C&WI RR)
West to Penn System RR (Leavitt)
North to 69th Street
West to Western
North to starting point

SUPPORTIVE DATA: Hubbard High School Racial/Ethnic and Membership Trend

Year	White	Black	Hispanic	Other	Membership
1975	93.9	0.0	3.9	2.2	2368
1978	91.6	1.0	6.0	1.4	1863
1980	81.2	8.5	9.3	1.0	1613

The projected racial/ethnic change, if this adjustment were implemented, could be as follows:

Year	White	Black	Hispanic	Other
1981-82	71.5	51.8	11.5	1.2

October 31, 1980—Student Racial/Ethnic Survey (percent)

	White	Black	Hispanic	Other
Hubbard	81.2	8.5	9.3	1.0
Gage Park	42.6	46.8	9.9	0.7
Harper	0.0	99.0	0.1	0.0

October 31, 1980—Student Racial/Ethnic Survey (percent) for Elementary Schools in the Hubbard High School Attendance Area.

	White	Black	Hispanic	Other
Pasteur (portion)	86.8	10.8	2.1	0.3
Peck (portion)	90.4	5.2	3.9	0.5
Sawyer	84.9	6.5	8.1	0.5
Tonti	78.5	6.8	13.5	1.2
Eberhart	89.5	2.3	7.6	0.6
Marquette	69.7	8.2	21.1	1.0
Hurley	66.5	26.8	4.9	1.8
Lee	81.1	15.1	3.8	0.0
Fleming	93.8	0.0	6.2	0.0
McKay	31.3	57.0	10.2	1.5

The White membership at Hubbard High School continues to decline.

1975	2223
1978	1707
1980	1310

Respectfully submitted,

Ruth B. Love
General Superintendent of Schools

BOARD OF EDUCATION OF THE CITY OF CHICAGO
PROPOSED
COMPREHENSIVE STUDENT ASSIGNMENT PLAN
FOR PUBLIC HEARINGS
DECEMBER 31, 1981

TEXT

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I. INTRODUCTION

This Comprehensive Student Assignment Plan comprises three parts. Part I consists of a textual description of the basic provisions of the Plan, a discussion of the implementation of those provisions and the rationale for their use as particular desegregative techniques. Part II contains an analysis of each of the more than 600 schools in the Chicago public school system. For each school, the Plan provides information about the nature of its current enrollment, its attendance area, the actions adopted by the Board by the Plan for the school and projected enrollment through the 1985 school year (reflecting the implementation of those actions). Part III consists of numerous appendices to the Plan.

A. THE LEGAL CONTEXT

In September 1980, the Chicago Board of Education (the "Board") began the development of a student desegregation plan for the Chicago public schools. This Comprehensive Student Assignment Plan (the "Plan") is the third and final portion of the Board's Student Desegregation plan.

This desegregation process was initiated when the Board entered into a Consent Decree with the United States Department of Justice, as authorized by Board resolution of September 24, 1980. The Consent Decree contains no admission, denial or presumption of liability on the part of the Board. It was approved by the United States District Court for the Northern District of Illinois on September 24, 1980.

By the Consent Decree, the Board agreed to develop and implement a system-wide student desegregation plan. The Decree recognizes that there is a broad range of constitutionally acceptable plans, and provides for the Board to retain the authority "in its discretion, to selection from within the constitutional range the plan that best meets the needs of the Chicago school district." [Decree, ¶ 3.1]

The Consent Decree established two basis objectives:

—Establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago.

—Provision of educational and related programs for any black or Hispanic schools remaining racially isolated.

Other principles guiding the development of the Desegregation Plan are provided by the Consent Decree on a number of subjects, among them stably integrated schools, student assignment techniques, educational programs, prevention of resegregation and financial cost. The Consent Decree is set forth as Appendix 1.

Pursuant to the Consent Decree, the Board adopted Part I of its Student Desegregation Plan on April 15, 1981—the *Recommendations On Educational Components.* These *Educational Components* were prepared by a team of nationally recognized consultants working in conjunction with Board staff.

The introduction to Part I of the Plan noted (pp. 4-5) that:

> "The Consent Decree recognizes that many schools in Chicago will likely remain racially isolated and therefore commits the district to undertake a comprehensive effort in compensatory activities .... The overriding goal of this plan is to address minority students' educational needs ... through improving achievement in all schools, with particular emphasis on those schools with the greatest needs and attended by children who have been the most disadvantaged."

The *Educational Components* addressed 14 subjects, covering both educational and administrative matters. It included adoption of specific measures for immediate implementation, delineation of policies to guide future activities of the Board, and initiation of ongoing studies, evaluation and monitoring. The broad scope of the *Educational Components* is reflected by its Table of Contents:

Educational Components

1. Curriculum and Instruction—Elementary Schools
2. Curriculum and Instruction—High Schools

3. Magnet Schools
4. Vocational and Technical High Schools
5. Special Education and Testing
6. Bilingual Education
7. Within-School Segregation
8. Student Discipline

Staff Development

Other Components

1. Public Participation
2. Metropolitan Initiatives
3. Faculty Desegregation and Affirmative Action
4. Evaluation
5. Monitoring

The *Educational Components* were in final form when adopted in April 1981, and extensive implementation of these components has already taken place. The Board has issued detailed Progress Reports in August and November 1981, which describe its implementation of the *Educational Components.*

Part II of the Desegregation Plan was adopted on April 29, 1981, and was entitled *Student Assignment Principles; Financial Aspects; General Policies Concerning the Desegregation Plan.* The *Student Assignment Principles* (the "Principles") established a framework both for implementation of student assignment measures in the 1981-82 school year, and for development of this Comprehensive Student Assignment Plan by the end of calendar year 1981.

The Principles provided definitions, policies, goals and a timetable for student assignment efforts. In summary, the Principles called for the Board to employ, in 1981 and 1982, a variety of student assignment techniques, including mandatory techniques not involving transportation and voluntary techniques. It was determined that those techniques would best meet the objective of providing for "establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago." [Consent Decree, § 2.1]

Upon adoption of the Principles, the Board undertook implementation activities for Fall 1981. During the Summer

of 1981, several questions and concerns as to the interpretation and application of the Principles were identified by the Department of Justice. Further discussions between the Board and Justice Department, and a review of the Board's actual implementation activities and their projected results, resolved the Justice Department's questions and concerns. This consensus was reflected in a Joint Statement filed with the Court on August 28, 1981, in which:

—A number of student assignment matters were discussed and clarified;

—The United States endorsed the Educational Components as an integral and necessary aspect of the Board's plan, and as consistent with the Consent Decree and the Constitution; and

—The parties agreed that "the [Student Assignment] Principles, and the general direction they establish, as clarified by this Joint Statement, are consistent with the requirements of the Consent Decree and the Constitution, since their proper implementation would lead to a final plan within the broad range of constitutionally acceptable plans."

Simultaneously with filing of the Joint Statement, the Board filed its August Progress Report describing in detail the process of implementation of student assignment measures for Fall 1981. Ten weeks into the school year, the Board filed another extensive Progress Report, describing and analyzing the preliminary results of those measures. (The Board's August and November Progress Reports are set forth as Appendices 2 and 3, respectively.)

On the basis of the first-year student assignment results and its continued planning work, the Board adopted on November 9, 1981, a Policy Resolution and Planning Guidelines for Student Assignment. These documents (set forth as Appendix 4) established various goals for desegregation and provided guidance for formulation of the final plan.

This Comprehensive Student Assignment Plan, together with the *Educational Components* and the Financial Aspects of Part II, constitute the Board's Student Desegregation Plan, adopted pursuant to the requirements of the Consent Decree. The student assignment plan set forth herein is

consistent with the requirements and purposes of the several documents described above. It has been developed from the Board's familiarity with and sensitivity to the unique situation presented in Chicago, and represents the Board's selection, from within the broad range of constitutionally acceptable plans, of the plan that the Board has determined best meets the needs of the Chicago School District.

So that relevant material may be comprehensively and conveniently presented in one document, this Comprehensive Student Assignment Plan supersedes the Student Assignment Principles and the General Policies Concerning the Desegregation Plan, which were contained in Part II of the Student Desegregation Plan. Relevant provisions of those two sections are incorporated into this final plan, with slight revision as appropriate. The various requirements and provisions of the Consent Decree (other than the provisions dealing with time requirements) shall govern all aspects of the Plan.

[7]

* * *

SCHOOLS WITH POTENTIAL FOR RACIAL CHANGE

Some schools are presently integrated but there exists the potential for racial change which would threaten that status. The Plan seeks to provide methods to stabilize integration at these schools.

[78]

* * *

B. BASIC PLAN PROVISIONS

1. *Definition and Identification.* Integrated schools with potential for racial change are schools which are presently integrated (at least 30% white and 30% minority),

but:

(a) are projected, absent stabilizing steps, to experience change over approximately 20 percentage points in white or minority enrollment by 1985;

(b) enroll students pursuant to a controlled enrollment plan; or

(c) have an enrollment over 50% white or minority, and on the basis of enrollment history or other factors, it appears that there is a threat of resegregation.

2. *Techniques.* To promote stability at these schools, various stabilizing techniques are adopted. These include:

(a) Not permitting additional voluntary transfers that do not enhance integration (see Section III(B) for a description of when this is true). Open enrollment transfers of children to these schools will continue, but only to the extent it will enhance integration and desegregation. Open enrollment transfers of additional children will not be allowed if the white enrollment is or would thereby fall below 50%.[1] The Board will closely monitor out-of-attendance area enrollment at each of these schools to ensure that all such transfers promote stability of integration. Schools will be required to report regularly to the Board on out-of-attendance enrollment to evidence of compliance with these requirements of the Plan.

(b) Encouraging voluntary transfers that enhance integration.

(c) Boundary adjustments.

(d) Academic program review, assessment and modifications, including the addition of new programs at these schools.

3. *Controlled Enrollment.*

(a) Controlled enrollment programs will be retained to maintain stability of racial composition at schools where they are presently being used. Controlled enrollment programs will be initiated at additional schools where necessary.

---

[1] No child, once properly enrolled in a school, will be excluded on this basis. Brothers and sisters of such a child will also not be excluded on this basis.

(b) Controlled enrollment may be implemented in various ways. These may include establishing targets for racial composition at the school and limiting enrollment in line with those target projections. It may also include making various areas a part of the attendance areas of both the controlled enrollment school and an adjacent school with racially distinct attendance patterns.

(c) Children who are excluded from a school because of controlled enrollment will be given their choice among the following alternatives:

(i) A voluntary transfer (open enrollment or permissive transfer) that enhances integration (with transportation provided at Board expense if the new school is not within walking distance).

(ii) Transfer to a magnet school or program that enhances integration in terms of the racial/ethnic goals of the particular school or program (with transportation provided at Board expense if the new school is not within walking distance).

(iii) Enrolling in a contiguous school.

(iv) Transferring to any other school where the transfer will not adversely affect integration or desegregation at the receiving school (e.g., minority student may transfer into a school that is substantially all minority where space is available). Transportation will not be provided by the Board for such transfers.

(v) Students residing within the area of such school and who are participating in bilingual education programs and in special education programs at controlled enrollment schools will not be excluded from enrollment in these schools.

[81]

* * *

D. IMPLEMENTATION OF PROVISIONS

1. *Identification.* The following schools are identified as integrated schools in which there is potential for racial change and at which controlled enrollment programs are

initiated or continued:

(a) Volta;
(b) Gage Park;
(c) Morgan Park;
(d) Young Elementary;
(e) Lewis Elementary;
(f) Hibbard.

[82]

* * *

(ii) *Educational Teams*

[86]

* * *

Gage Park, a school desegregated by means of a controlled enrollment program (see above), is teamed with Hubbard High School in order to attract additional white students to Gage Park and thereby allowing additional minority students residing in the Gage Park attendance area to attend the school.

[86]

* * *

2. *Techniques (Other than Controlled Enrollment).* For schools identified in this section, the following techniques are adopted:

(a) Encouraging voluntary transfers that do enhance integregation.

(b) New educational programs:

(i) Specialty Programs

Specialty programs (see Section III(C) for a detailed description of specialty programs) will be created at Gage Park and Morgan Park High Schools. These schools are currently controlled enrollment schools and are substantially below capacity. These specialty programs will be implemented to attract additional white students into these schools, thereby permitting more minority students residing in the attendance area to enroll and stabilizing current enrollment patterns.

[87]

* * *

3. *Controlled Enrollment.* For the following schools, controlled enrollment programs are adopted or continued.[2]

(i) *Gage Park High School (District 12).* During the early and mid 1970's, enrollment of white students declined from 49.4% in 1972 to 37.2% in 1979, and enrollment of black students correspondingly increased. A controlled enrollment program with the following racial composition of entering classes: 50% white, 50% minority, was instituted. To implement the program, minority students residing in the attendance area are selected by lottery to attend the school. Those who are ineligible to attend Gage Park may attend selected receiving high schools. Transportation for students is provided by the Board.

(ii) *Morgan Park High School (District 18).* A controlled enrollment program similar in nature to that instituted at Gage Park was also instituted at Morgan Park with the following racial composition of entering classes: 50% white, 50% minority, with the objective of stabilizing white enrollment and maintaining it as an integrated school. The results of this program cannot yet be assessed.

[89]

* * *

2.4 *Mandatory Requirement For the Desegregation of All Predominantly White Schools.* Any school which had an enrollment of white children in excess of 70% as of October 1980 is required to become a stably integrated or desegregated school not later than fall 1983, and to make substantial progress toward that goal in each preceding year beginning in school year 1981-1982. Substantial progress shall be considered as having been made only if the difference between the October 1980 white enrollment percentage for the school and the 70% figure is reduced by at least 1/3 (or 5% of enrollment, whichever is greater) by school year 1981-82, by at least 2/3 (or 10% of enrollment, whichever is

[2] These programs are described in further detail in the school-by-school analysis.

greater) by school year 1982-83, and is eliminated by the fall of 1983. The Board will establish affirmative methods or programs specifically directed to each school that fails to meet this progress requirement (such as designating the school a special receiving school for voluntary transfers), and will annually report to the Court identifying such schools and the steps being taken with respect to them.

[110]

* * *

Mandatory Requirement That All Schools Have At Least 30% Minority Enrollment. Having established the definition of a desegregated school (and the definition of a magnet school), the Plan seeks to establish the greatest practicable number of stably desegregated schools. In part, the fulfillment of this objective is sought through the mandatory requirement that all schools in the system have at least 30% minority enrollment.

At the time development of this Plan commenced in October 1980, 15 schools were already stably desegregated as a result of the Board's previous efforts. At that time, however, 81 schools (10 high schools and 71 elementary schools) had less than 30% minority enrollment.

In the first year of the plan, by October 1981, this has been reduced to 34 schools (3 high schools and 31 elementary schools). As part of this process, the number of schools with less than 20% minority enrollment has been reduced from 37 to 3, a reduction of 92%.

[121]

* * *

3. *Mandatory Reassignment Involving Transportation.* Mandatory reassignment involving transportation should be used only after the other techniques have been given the opportunity to succeed, and it has been determined by the Board that such techniques have not achieved, and do not promise to achieve, desegregation objectives that are in fact

practicably achievable. After the second year of plan implementation is substantially in place at the end of October 1982, the Board will assess the results that have been attained, and the additional results that are likely to be attained in future years, by voluntary techniques and mandatory techniques not involving transportation. The Board will also assess whether those techniques have failed to meet basic requirements of the Consent Decree and the Student Assignment Principles. The Board will then assess whether mandatory reassignment involving transportation, in accordance with the contingency plan set forth below in Section 7, could practicably be successful in attaining desegregation objectives where other techniques have failed. The Board shall make this determination by June 1983.

[162]

* * *

C. IMPLEMENTATION OF PLAN PROVISIONS

High school feeder patterns have been examined on a systemwide basis for practicable adjustments in the Desegregation Plan.

For the first year of the plan in fall 1981, feeder patterns were examined on a systemwide basis in three types of situations:

1. Locations where predominantly white and predominantly minority high schools were adjacent to one another;
2. Other high schools with less than 30% minority enrollment as of October 1980; and
3. High schools where controlled enrollment plans were in effect.

On the basis of October 1980 enrollment, there were seven instances in which high schools with less than 30% minority enrollment were adjacent to high schools with more than 70% minority enrollment. Feeder pattern adjustments were adopted in five of these seven situations, as follows:

Foreman—Kelvyn Park	Lloyd Elementary School shifted to Kelvyn Park

Kelly—Tilden Juarez, Harrison & Farragut	Seward Elementary School shifted to Kelly
Hubbard—Harper	McKay Elementary School shifted to Hubbard
Bogan—Calumet	Geographical section of Calumet feeder pattern shifted to Bogan
Washington—Bowen	Bright, Black and Marsh Elementary Schools shifted to Washington

In two other situations, the Board determined that feeder pattern adjustments between predominantly white and predominantly minority high schools were not practicable: Steinmetz—Austin and Mather—Senn. In both instances, the predominantly white schools were stably desegregated by other methods, and one of the predominantly minority schools (Senn) is identified in the plan as a stable mixed school.

Two other high schools that had less than 30% minority as of October 1980, Taft and Kennedy, were not adjacent to any predominantly minority high schools. Nonetheless, they were examined for possible feeder pattern adjustments for fall 1981. Adjustments were determined not to be practicable, for reasons detailed in the August Progress Report. Kennedy has been, and Taft will be in 1982, stably desegregated by other methods. The Washburne Trade School also achieved more than 30% minority enrollment in fall 1981.

Finally, the process for fall 1981 examined Gage Park and Morgan Park high schools, where enrollments of about 60% minority and 40% white have been maintained for several years by controlled enrollment plans. Those schools were examined to determine whether feeder pattern adjustments could render the controlled enrollment plans unnecessary. It was determined (for reasons detailed in the August Progress Report at pages 136-142) that feeder pattern adjustments could not establish stable integration in the absence of the controlled enrollment plans, and accordingly the plans were maintained. An adjustment adding two predominantly

white elementary schools to the Gage Park feeder pattern was adopted in an effort to strengthen the controlled enrollment plan at that school.

Both the overall process and the school-by-school practicability considerations were examined in August 1981 by the Department of Justice. In the Joint Statement filed on August 28, 1981, the Justice Department advised the Court that:

> "The United States has reviewed the Progress Report and believes that, in general, the Board has implemented [boundary adjustment] techniques in a responsible way in Phase I. The United States is generally satisfied that the types of adjustments considered, and the determinations as to which were practicable, are reasonable and consistent with the Consent Decree."

During the fall, an evaluation of the effectiveness of September 1981 high school feeder pattern adjustments has been made to provide guidance in the consideration of possible additional adjustments for fall 1982.

As to the five predominantly white high schools, this evaluation was somewhat difficult because all five schools also receive voluntary transfers of minority students under the Open Enrollment and Permissive Transfer programs. Three of the five high schools became stably desegregated, and the two others made very significant progress and will be desegregated by October 1982. The Board's evaluation is that the feeder pattern adjustments did make some contribution to this set of successful outcomes, but that the voluntary transfer programs appear to have been the major factor. At Bogan High School, for example, minority enrollment increased between 1980 and 1981 from 83 students to 366, increasing the minority enrollment at the school from 5% to 22%. Black enrollment at Bogan increased from 13 to 257. Most of these increases, however, are attributable to voluntary transfer students.

On the other hand, it appears that the feeder pattern adjustments involving Kelvyn Park and Gage Park were not effective. White enrollment at Kelvyn Park declined by 54 students and white enrollment at Gage Park declined by 64

students.

In summary, the fall 1981 boundary adjustments for desegregation purposes, including both elementary school attendance areas and high school feeder patterns, affected a total of 33 schools, including 16 schools over 70% white and 15 schools over 70% minority, the great majority of the latter being predominantly black schools. The adjustments called for the transfer of approximatley 1,900 students and sought to affect the desegregation of approximately 15,000 students. Somewhat less than these projected results were achieved because of situations in which students refused to accept the transfers, and either left the system or made other transfers within the school system.

In developing this final plan, the Board has once again reviewed all situations in which predominantly minority schools are adjacent to predominantly white schools. Feeder pattern adjustments adopted for 1981 continue, of course, and provide additional desegregative impact in 1982 and again in 1983 as additional classes of entering ninth graders move from the reassigned elementary schools to the new high schools.

[205]

* * *

B. PROGRAM DESCRIPTIONS, OBJECTIVES AND SITES

Existing student assignment methods are used in the plan, as described in Section B, to achieve the greatest practicable desegregation which those methods can provide.

To increase the total desegregative impact of the plan, and to provide increased educational opportunities for students in schools that cannot be desegregated, it is desirable to establish new programs that combine student assignment and educational objectives. The plan creates four types of new programs:

Metropolitan Schools
Scholastic Academies
Specialty Programs
Team Schools

A major focus of these new programs is to provide new desegregation impact, or to enhance existing integration and desegregation. At the same time, however, these programs respond to Section 2.2 of the Consent Decree by providing educational measures for compensatory purposes where certain schools remain racially identifiable.

Depending upon the particular circumstances of the individual sites in which they are located, the new programs serve one or more of the following purposes:

1. To increase the total number of students participating in integrated, desegregated and racially mixed schools.
2. To seek to attract white students into predominantly minority schools where existing methods cannot practicably do so, or cannot be expanded, though not necessarily in sufficient numbers to establish desegregated schools.
3. To attract sufficient numbers of minority students into predominantly white or newly desegregated schools to create or enhance stable desegregation.
4. To expand the range and scope of educational choices available, particularly to students in racially isolated and predominantly minority schools.
5. To attract students—minority and white—from the nonpublic schools in Chicago into the public schools.
6. To provide an initial programmatic basis for a voluntary interdistrict transfer program.

All of the methods are based on the premise that voluntary movement of students will result from the creation of exceptional educational offerings which are located in sites that (a) can accommodate the programs, (b) will be positively affected by the program, and (c) will have a reasonable capability of attracting the necessary proportion of students.

The four new methods being established in the Plan will impact 70 schools:

6 Metropolitan Schools
6 Scholastic Academies
14 Specialty Programs—elementary
8 Specialty Programs—high school

24 Team schools—elementary
12 Team schools—high school

The discussion below summarizes the essential characteristics of each method and explains the rationale for application to specific sites. Particular sites may be integrated, desegregated, or predominantly minority in character. Accordingly, portions of this discussion, while presented in the section on Desegregation of Schools for convenient description, in one location in the plan, apply to each of those major sections to the plan. Appropriate cross references are provided in other sections.

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* * *

Metropolitan Schools

These are high schools that offer sequenced courses of study in a broad field, e.g., the sciences, or communications. The model is the famed New York High School of Arts, a school in which the many disciplines in a single field of study are offered.

The Metropolitan School will be able to provide intensive, four-year study in specialized areas. At the same time, the existence in a single school of many related areas will stimulate interdisciplinary study. Further, students may readily move from one specialized course to another, if they find it more appropriate. Thus, in the Metropolitan School of Medical and Health Services, a student who begins in a pre-nursing program may choose to switch into a program to prepare for pre-medical school in college.

[211]

* * *

Metropolitan schools will be open to all high school students in Chicago, both current public school students and students presently enrolled in private and parochial schools in Chicago. If a voluntary interdistrict transfer program is developed (see Part VII of the plan), the metropolitan school will be a central offering for suburban students.

In order to ensure a reasonable opportunity for all students to participate in these schools, all Metropolitan School programs will seek to establish and maintain a racial/ethnic composition of at least 50% and not more than 85% minority enrollment (15% to 50% white enrollment). This range is between the basic range of the plan (30%-70% white and minority) and the range established for magnet schools (15%-35% white, 65%-85% minority). This range is established in recognition of differences in program locations and the potential for drawing students from the suburban and the city non-public schools. The Metropolitan School is one technique (the Scholastic Academy is another) designed to attract students back *into* the public school system, in integrated, desegregated and mixed settings.

[212]

* * *

Scholastic Academies

The Scholastic Academy is an elementary school that offers a traditional educational program with active involvement of the parents, working with the teachers and the students. It has a strict code of conduct and dress for students, a commitment by the parents to ensure the child's attendance and completion of homework, and frequent communication between the home and the school as a requirement. The only enrichment is the inclusion of a full-day kindergarten program.

The Scholastic Academy is designed to attract students from the private and parochial schools, as well as the public schools, by offering a "no-frills" education based upon the parents' commitment to the school and the child's education. As such, it will seek to achieve the same enrollment composition range as the Metropolitan School: 50% to 85% minority, 15% to 50% white. Again, as with the Metropolitan School, desirable targets of desegregation are established, but not required, for each site.

Scholastic Academies are open to all students. There are

no achievement-based admissions requirements. Scholastic Academies will not have attendance areas—since they will draw citywide—but the students currently enrolled in the schools so designated will have priority placement on admission, if they wish to apply.

[218]

* * *

Specialty Programs

The Specialty Program is a special area of study, or depth of study in an area, offered by one or a very few schools. It is intended to provide educational enrichment to students. In some locations, it is compensatory; in some it will serve to contribute to desegregation; in some it will do both.

In the Plan, Specialty Programs are designated for both high schools and elementary schools. Among the high schools, 5 of the 8 specialty programs are compensatory: at Austin, Crane, King and DuSable (all of which are 100% non-minority), and at Tilden, which is predominantly minority. Of the 14 elementary school specialty programs, only two are compensatory: at the James Ward, which is predominantly minority and at the Michell Clark, which is racially isolated. The others are intended to contribute to desegregation of enrollment, as described below for each site.

[220]

* * *

Gage Park (Dist. 12) and *Morgan Park* (Dist. 18) are both controlled enrollment schools, in which minority students are lotteried out in order to maintain enrollment compositions of about 40% white, 60% minority. Both schools, are below capacity. The Specialty Programs are intended in part to attract additional white students into these schools, which would thereby permit more minority students residing in the attendance areas to enroll in these schools. (For Gage Park, see also *Teaming*, below.)

[221]

* * *

Teaming of Schools

Teaming is a method of joining schools with complementary features in order to achieve or enhance desegregation. It consists of two or more schools being linked. Each school, in cooperation with the other team members, develops a special offering or feature. This could be organizational (one school becoming a primary, the other an intermediate-upper), instructional (different approaches to teaching and operating), or programmatic (different specialized subject offerings).

There are essentially two types of Teams: the dual desegregative type, designed to enhance desegregation in all the schools in a Team; and the desegregative/compensatory type, designed to enhance desegregation in one of the schools and to provide compensatory educational opportunities to students in a predominantly minority or racially isolated school. In the latter situation, the racially identifiable school may enroll some white students—in fact, it would be expected to do so but these would be insufficient to move the school significantly toward desegregation. A significant number of the teams involve schools that are not contiguous.

Teaming is being applied to both elementary schools and high schools. The Plan calls for seven high school teams involving 17 schools and 10 elementary teams involving 24 schools.

[223]

* * *

Gage Park/Hubbard. Gage Park is a stably desegregated school, as a result of the controlled enrollment stablization program in operation in the school. This program has resulted in a large number of minority students being excluded from Gage Park in order to maintain an enrollment of about 40% white, 60% minority. The school is below capacity. Hubbard is a predominantly white school. The purpose

of the Teaming is two-fold: to attract additional white students into Gage Park, thereby permitting more black students residing in the Gage Park area to enroll in the school; and, to increase the minority enrollment at Hubbard to approximately 35-40%.

[223]

* * *

III.

D. CONTINGENCY PLAN: MANDATORY BACKUP

The Plan primarily uses non-compulsory desegregation techniques, and mandatory techniques not involving transportation. These techniques are used because they are more likely to produce stably desegregated schools in Chicago. They will produce as many if not more stably desegregated schools than would a plan relying on mandatory transportation techniques. And the techniques without compulsory transportation will succeed with less cost, greater stability and much greater potential for long term achievement.

Should the Plan fail, however, to achieve specified minimum levels of desegregation, additional mandatory measures including transportation may be used. This Section sets forth a contingency plan which provides for the timing, extent and circumstances under which these additional mandatory measures will be employed.

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* * *

BASIC PLAN PROVISIONS

1. Mandatory backup measures will not be used except to the extent that the techniques used by the Plan fail to meet, or to promise to meet, the requirements of the Plan specified in paragraph 5 below.

2. Mandatory backup measures will not be used in school year 1982-83. This is to enable the Board to assess the extent to which other techniques have succeeded or are expected to

succeed without mandatory transportation.

3. By June 1983, the Board will determine the extent to which and the circumstances under which mandatory backup measures will be used starting in the Fall of 1983.

4. All children at magnet schools, stably integrated schools and stably desegregated schools in each year will be exempt from mandatory backup measures for that year.

5. Mandatory backup measures will be used only to remedy the failure of a school to achieve or to promise to achieve at least 30% minority enrollment by October 31, 1983, or the failure to desegregate or to promise to desegregate predominantly minority schools by the assignment of children from predominantly white schools, in excess of 70% white enrollment, by October 31, 1983.

[231]

* * *

Supplemental Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KATHY SUE JOHNSON, etc. et al., and
DARCEL MILTON, etc. et al.,
Petitioners,

v.

BOARD OF EDUCATION
OF THE CITY OF CHICAGO, et al.,
Respondents.

SUPPLEMENTAL OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents.

SUPPLEMENTAL OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Following public hearings on the proposed desegregation plan referred to on pages 6 and 7 of Respondents' Opposition, the Board of Education approved a final plan on January 22, 1982, and the same day submitted that plan to District Judge Shadur in accordance with the consent decree.[1]

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[1]Selected provisions of the final plan are reprinted at Supp. App. 1-6.

The elements of the proposed plan described in the Opposition are substantially unchanged in the final plan with one significant exception. While the proposed plan called for a ratio of 50% white, 50% minority at Gage Park and Morgan Park high schools, the final plan establishes a ratio, within a 5% range, of 35% white, 65% minority at these two schools and at all other controlled enrollment schools. (Supp. App. 6) This ratio change, together with the other plan provisions, will reduce, if not eliminate, exclusions of minority students from Gage Park and Morgan Park.

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February 8, 1982

Supplemental Appendix

BOARD OF EDUCATION OF THE CITY OF CHICAGO

COMPREHENSIVE STUDENT ASSIGNMENT PLAN

Text

January 22, 1982

SCHOOLS WITH POTENTIAL FOR RACIAL CHANGE

There are thirteen schools which are presently integrated but there exists the potential for racial change which would threaten that status.* The Plan seeks to provide methods to stabilize integration at these schools.

*Not included in this category are schools whose enrollment is currently integrated (30%-70% white, 30%-70% minority) but is projected to decline to less than 30% white (a mixed enrollment). These schools are addressed at pp. 100-106.

[84]

* * *

B. BASIC PLAN PROVISIONS

1. *Definition and Identification.* Integrated schools with potential for racial change are schools which are presently integrated (at least 30% white and 30% minority), but:

(a) are projected, absent stabilizing steps, to experience change over approximately 20 percentage points in white or minority enrollment by 1985;

(b) enroll students pursuant to a controlled enrollment plan; or

(c) have an enrollment over 50% white or minority, and on the basis of enrollment history or other factors, it appears that there is a threat of resegregation.

2. *Techniques.* To promote stability at these schools, various techniques are adopted. These include:

(a) Encouraging voluntary transfers that enhance integration and not permitting additional voluntary transfers that do not enhance integration (see pp. 191-193 for a description of when these conditions apply).

(b) Boundary area adjustments.

(c) Academic program review, assessment and modifications, including the addition of new programs at these schools.

3. *Controlled Enrollment.*

(a) Controlled enrollment programs, a particular technique used to relieve overcrowding and to maintain stability of racial composition, will be continued at schools where they are presently being used. Controlled enrollment programs will be initiated at additional schools where necessary.

(b) Controlled enrollment may be implemented in various ways. These may include establishing targets for racial composition at the school and limiting enrollment in line with these target projections. It may also include placing part of an attendance area within both the controlled enrollment school and an adjacent school that has a racially distinct enrollment composition.

(c) Children who are excluded from a school because of controlled enrollment will be given their choice among the following alternatives:*

(i) Enrolling in a contiguous school.

(ii) A voluntary transfer (open enrollment or permissive transfer) that enhances integration (with transportation provided at Board expense if the new school is not within walking distance).

(iii) Transfer to a magnet school or program that enhances desegregation of the particular school or program (with transportation provided at Board

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* Students residing within the area of a controlled enrollment school who are participating in bilingual education programs and in special education programs at controlled enrollment schools will not be excluded from enrollment in these schools if the exclusion would significantly diminish the bilingual educational services these children receive.

expense if the new school is not within walking distance).

(iv) Transferring to any other school where the transfer will not adversely affect integration or desegregation at the receiving school (e.g., a minority student may transfer into a school that is substantially minority where space is available). Transportation will be provided by the Board for such transfers.

[87]

* * *

IMPLEMENTATION OF PROVISIONS

1. *Identification.* The following schools are identified as integrated schools in which there is potential for racial change and at which controlled enrollment programs are initiated or continued:

(i) Hibbard Elementary;

(ii) Volta Elementary;

(iii) Lewis Elementary;

(iv) Young Elementary;

(v) Gage Park High School;

(vi) Morgan Park High School.

[88]

* * *

2. *Techniques (Other Than Controlled Enrollment).* For schools identified in this section, the following techniques are adopted:

(a) Encouraging voluntary transfers that enhance integration. Open enrollment transfers of children to these schools will continue, but only to the extent it will

enhance integration and desegregation. Open enrollment transfers of additional children will be allowed on a majority-to-minority basis.* The Board will closely monitor out-of-attendance area enrollment at each of these schools to ensure that all such transfers promote stability of integration. Schools will be required to report regularly to the Board on out-of-attendance area enrollment as evidence of compliance with these requirements of the Plan.

(b) New educational programs are established at certain of these schools:

(i) *Specialty programs.* Specialty programs (see p. 252 for a detailed description of specialty programs) will be created at Gage Park and Morgan Park High Schools. These specialty programs will be implemented to attract additional white students into these schools, thereby permitting more minority students residing in the attendance area to enroll and stabilizing current enrollment patterns.

(ii) *Educational Teaming.* Gage Park High School, a school enrolling students pursuant to a controlled enrollment program (see below), is teamed (see pp. 253-255 for a description of educational teaming) with Hubbard High School in order to attract additional white students to Gage Park and thereby allowing additional minority students residing in the Gage Park attendance area to attend the school.

---

* No child, once properly enrolled in a school, will be excluded on this basis. Brothers and sisters of such a child also will not be excluded on this basis.

[95]

* * *

3. *Controlled Enrollment.* For the following schools, controlled enrollment programs are adopted or continued

except that under this Plan, a single ratio for enrollment for all controlled enrollment schools is established for 1982, of 35% white, 65% minority, within a range of 5 percentage points. This ratio supersedes any other ratios or target compositions currently in force, and it [sic] to be reviewed annually as part of the Annual Desegregation Review by the Board, beginning in 1983.

(i) *Gage Park High School (District 12).* Enrollment of white students declined from 49.4% in 1972 to 37.2% in 1979, and enrollment of black students correspondingly increased. A controlled enrollment program was instituted and will be continued as part of the Plan to stabilize the racial composition at this school. The controlled enrollment program at Gage Park provides for entering classes to have the following racial composition: 50% white, 60% [sic] minority.

(ii) *Morgan Park High School (District 18).* A controlled enrollment program similar in nature to that instituted at Gage Park was also instituted at Morgan Park. This program is continued as part of the Plan, with the objective of stabilizing white enrollment and maintaining Morgan Park as an integrated school.

[96]

* * *

D. RATIONALE

A major focus of any desegregation plan should be to preserve the existing integration. Otherwise, the opportunity for school integration is lost and what began as neighborhood integration rapidly becomes neighborhood resegregation. Vigorous efforts to interrupt the process of resegregation are needed and are adopted by the Plan.

[99]

* * *

Petitioner's Reply Brief

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In the Supreme Court of the United States

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 22, this Reply Brief is limited to the arguments first raised in the Chicago Board of Education's Opposition to Petition for a Writ of Certiorari.

ARGUMENT

In its continuing effort to avoid this Court's review, the Chicago Board again argues that changing circumstances have rendered this case moot. However, the Board nowhere addresses the holding of the Court of Appeals that neither of the two factors required for a showing of mootness have been established. *County of Los Angeles* v. *Davis,* 440 U.S. 625 (1979). First, the alleged violation persists, and presents a viable case and controversy, because plaintiffs continue to be excluded from their neighborhood school on account of race. (Pet. App. at 7). In addition, the Board remains free, notwithstanding the Consent Decree, to exclude only blacks (Pet. App. at 5-6), and to reinstate all the features of the quota plans which it modified after this Court's initial grant of *certiorari* in July, 1980. In all respects, therefore, "the defendant is free to return to [its] old ways." *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632 (1953). The strict requisites for a finding of mootness have not been satisfied.

The complicated detail in the Board's brief about the Consent Decree and the slight changes recently made in the quota plans—designed to suggest that the case presents a complex and confused factual setting which makes *certiorari* inappropriate—is entirely irrelevant. The issue is not whether the Board made any ameliorative changes while awaiting a decision by this Court.* As the history of this case shows—including the Board's temporary "abandonment" of the quotas after *certiorari* was first

* As noted in the Petition for Certiorari, n.* at 11-12 and n.* at 16-17, these changes in any event do not diminish plaintiffs' constitutional attack on the quotas.

granted*—such changes will continue to be made indefinitely, to avoid this Court's review. Rather, the Board must show that there is "no reasonable expectation that the wrong will be repeated," *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953), and that the changes it claims to have made are permanent and irrevocable. It has not made such a showing.

As the Court of Appeals found, nothing in the Consent Decree prevents the Board from continuing the quotas or imposing all the features which plaintiffs challenged on their first appeal. The only conceivably relevant Consent Decree requirement is that burdens not be imposed "arbitrarily" on any racial group (Bd. App. at 8). This provision falls far short of ensuring that burdens are distributed equitably, as is constitutionally required. (Petition for Certiorari at 23-24.) And as the Court of Appeals found, this Consent Decree provision does not preclude the use of racial quotas excluding only blacks (Pet. App. at 6).

---

* The Board suggests that the quotas were abandoned "so it could start with a clean slate," and then readopted eight months later "as an element of its system-wide plan." (Br. at 4). In fact, the quotas were reinstituted on April 15, 1981, on the same day the Board rejected its consultants' plan calling for mandatory measures; the Board's all-voluntary system-wide plan was not adopted until April 29, 1981. See Petition for Certiorari at 5. Thus, the Board's contention that these quotas must be viewed as part of a system-wide desegregation effort (at 11-13) is misleading and erroneous. These quotas were implemented before any system-wide plan. And in any event, since the principal thrust of the Board's current plan is to preserve disproportionately high white enrollments, with little regard for black children attending minority schools—see footnote at p. 6, *infra*—racial quotas designed for that purpose deserve little deference, particularly where they place the entire burden of integration on black children.

Thus, a denial of *certiorari* would leave the Board free to impose the burdens of desegregation exclusively on black children, throughout the entire Chicago school system. Absent a ruling by this Court, the controlling precedent in the Seventh Circuit would be the initial Court of Appeals decision, 604 F.2d 504 (7th Cir. 1979)---that as long as the Board professes an integrative purpose, it may lawfully exclude only blacks from an integrated school, even where the result is effectively to deny those children an integrated education.

It is accordingly disingenuous for the Board to contend (at 10-11) that plaintiffs have a "preferable forum" to challenge the quotas by joining the Consent Decree litigation before Judge Shadur. Plaintiffs are not parties to that action, and Judge Shadur has already denied three petitions for intervention, including two by the N.A.A.C.P. *See, e.g., United States* v. *Board of Education*, 88 F.R.D. 679 (N.D. Ill. 1981). More important, the Consent Decree proceeding is virtually certain to provide no relief to plaintiffs. Like any district judge in the Seventh Circuit, Judge Shadur will be bound by the very Court of Appeals decision which plaintiffs are now challenging; he can scarcely be expected to invalidate quotas which the Seventh Circuit approved. Plaintiffs thus would have no means of securing any relief until several years hence, after Judge Shadur issues a final order, the issues are reviewed by the Seventh Circuit, and *certiorari* is again sought. In the interim, hundreds of black children each year will be excluded from Morgan Park and Gage Park High Schools on account of their race.

Thus, it is appropriate that the Court review the Morgan Park and Gage Park quotas now, and on the basis of the present record. Because the Board is free to rescind the

changes it made after the Court of Appeals' initial decision, a ruling by this Court is necessary to assure plaintiffs that at least certain wrongs—as set out in the existing record—will not be repeated.* Moreover, resolution of the legal principles involved will have a significant impact with respect to the Consent Decree as well, by determining the extent of the burdens which may be imposed on blacks in the name of integration. Indeed, on the strength of the initial Court of Appeals decision, the Board not only retained ceilings on black enrollments at Morgan Park and Gage Park High Schools, but extended such ceilings to four other schools as well, and suggested they might be used in still other schools in the future. (*See* Pet. Supp. App., which reprints pp. 88-90 of the Board's proposed plan, portions of which were omitted from Bd. App. at 54, as well as the comparable provisions of the Board's final plan, as proposed on January 22, 1982). In each case, the new quota freezes minority enrollments at a level below that at which minorities would seek to attend, and specifies a white enrollment at least twice the 17% applicable to the school system as a whole.

In short, absent a decision by this Court, the Board will continue to adopt quotas excluding blacks in order to

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* There would still remain the task of determining on remand how the changes already made by the Board, if they remain in effect, are affected by this Court's decision. That process, however, is conceptually no different from determining whether changes made by a litigant after a decision by this Court are sufficient to dictate a different result. Because, absent ruling by this Court, the Board is free to return to its old ways, the fact that it announced certain changes before this Court's decision, rather than afterwards, makes no difference.

provide disproportionately high white enrollments.* It will continue to place the entire burden of "integration" on black children. And this practice, sanctioned by the Court of Appeals' initial decision, will serve as a blueprint for other school districts throughout the nation.

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* Indeed, the key features of the Board's latest plan are that schools which are 70% white will be deemed integrated (Bd. App. at 52-54), and that other schools will be maintained as at least 50% white (Bd. App. at 41), or at other disproportionately high white enrollments (Bd. App. at 49-52; Pet. Supp. App.) through the use of quotas or other so-called "stabilizing" techniques. Since the school system as a whole is only 17% white, such features imply that most black children will attend schools that are predominantly or entirely minority. Thus, the deference allowed school officials in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (Bd. Br. at 12), is inappropriate; this is not a case in which a school board arranged that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Id.* at 16. Rather, the Board's plan seems calculated only to preserve schools for the white community, often at the expense of black children. Indeed, "mandatory reassignment involving transportation"—which in any event will not even be considered under the Board's plan until October 31, 1983—will never be used unless, and only to the extent, necessary to reduce white enrollments at certain schools below 70%. (Bd. App. at 53-54, 63-64). This stands in stark contrast to the present treatment of plaintiffs and other excluded black children, who are *now* subject to "mandatory reassignment involving transportation" for the purpose of maintaining disproportionately high white enrollments at Gage Park and Morgan Park. Thus, the Board's plan as a whole gives scant assurance that the Board will not return to its old ways, and readopt every offensive feature of the racial quotas which plaintiffs are now challenging. Moreover, it is scarcely the sort of system-wide desegregation plan which should prompt this Court to ignore the constitutional deprivation suffered by black children excluded from Morgan Park and Gage Park.

CONCLUSION

For all these reasons, the Petition for Certiorari should be granted.

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Supplemental Appendix

SUPPLEMENTAL APPENDIX

Board of Education of the City of Chicago
Proposed
Comprehensive Student Assignment Plan
For Public Hearings
December 31, 1981
(pp. 88-90)

3. *Controlled Enrollment.* For the following schools, controlled enrollment programs are adopted or continued.*

(i) *Gage Park High School (District 12).* During the early and mid 1970's, enrollment of white students declined from 49.4% in 1972 to 37.2% in 1979, and enrollment of black students correspondingly increased. A controlled enrollment program with the following racial composition of entering classes: 50% white, 50% minority, was instituted. To implement the program, minority students residing in the attendance area are selected by lottery to attend the school. Those who are ineligible to attend Gage Park may attend selected receiving high schools. Transportation for students is provided by the Board.

(ii) *Morgan Park High School District 18.* A controlled enrollment program similar in nature to that instituted at Gage Park was also instituted at Morgan Park with the following racial composition of entering classes: 50% white, 50% minority, with the objective of stabilizing white enrollment and maintaining it as an integrated school. The results of this program cannot yet be assessed.

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* These programs are described in further detail in the school-by-school analysis.

(iii) *Hibbard Elementary School (District 1).* White enrollment declined from 52% white in 1977 to 38.1 white in 1980. A controlled enrollment plan was then instituted with the following racial composition target: 38% white, 62% minority, with enrollment closed at the then current level and enrolling no new students except for kindergarten, special education students and siblings of students already involved. In addition to reducing enrollment by attrition, the plan also encouraged voluntary transfers of minority students to Program Options schools. Furthermore, the controlled enrollment plan envisioned that Hubbard [sic] will become a receiving school under the permissive transfer program for white children once the school's enrollment falls below capacity.

(iv) *Lewis Elementary School (District 4).* White enrollment at Lewis declined from 37.5% in 1978 to 22.2% in 1979. A controlled enrollment plan with the following racial composition target: 22% white, 78% minority, was instituted whereby current enrollment was frozen, with subsequent enrollees counseled as to other desegregative program options. New students are enrolled in subsequent semesters only as membership is reduced through transfers and graduation. This controlled enrollment plan has been successful in stabilizing enrollment of white students.

(v) *Young Elementary School (District 4).* White enrollment at Young had declined from 48.9% in 1978 to 38.5% in 1979. A controlled enrollment plan was instituted with the following racial composition target: 49% white, 51% minority, similar to that established at the Lewis school. To date, the program has been successful in somewhat stabilizing enrollment of white children.

4. *Review.* Each year as part of the Annual Desegregation Review the Board will consider whether additional stabilizing steps are required at any of these schools. It will also examine whether stabilization methods, including controlled enrollment need to be introduced at additional schools.

Board of Education of the City of Chicago
Comprehensive Student Assignment Plan

January 22, 1982
(pp. 95-98)

3. *Controlled Enrollment.* For the following schools, controlled enrollment programs are adopted or continued except that under this Plan, a single ratio for enrollment for all controlled enrollment schools is established for 1982, of 35% white, 65% minority, within a range of 5 percentage points. This ratio supercedes any other ratios or target compositions currently in force, and it to be reviewed annually as part of the Annual Desegregation Review by the Board, beginning in 1983.

(i) *Gage Park High School (District 12).* Enrollment of white students declined from 49.4% in 1972 to 37.2% in 1979, and enrollment of black students correspondingly increased. A controlled enrollment program was instituted and will be continued as part of the Plan to stabilize the racial composition at this school. The controlled enrollment program at Gage Park provides for entering classes to have the following racial composition: 50% white, 60% [sic] minority.

(ii) *Morgan Park High School (District 18).* A controlled enrollment program similar in nature to that instituted at Gage Park was also instituted at Morgan Park. This program is continued as part of

the Plan, with the objective of stabilizing white enrollment and maintaining Morgan Park as an integrated school.

(iii) *Hibbard Elementary School (District 1).* The Hibbard School is located in a neighborhood that is experiencing a rapid growth in minority population. In October of 1980 the Board adopted a controlled enrollment program designed primarily to relieve overcrowding at the school. This was to be accomplished through attrition and a freeze on new enrollment (except for kindergarten, special education and siblings of current students). The program contributed to maintaining integration of Hibbard by reducing the rate of change and by giving priority for any seats that might become available to white students (the school is currently 35% white).

(iv) *Lewis Elementary School (District 4).* White enrollment at Lewis declined from 38.2% in 1978 to 23.5% in 1979. A controlled enrollment plan was instituted with the following ratio of enrollment within 15 percentage points of the city-wide composition. Current enrollment was frozen, with subsequent enrollees counseled as to other desegregative program options. New students are enrolled in subsequent semesters only as membership is reduced through transfers and graduation, except for kindergarten, special education and siblings of current students. This program is to be continued under the Plan.

(v) *Young Elementary School (District 4).* Enrollment of white children at Young had declined from 42.8% in 1978 to 29.0% in 1979. A controlled enrollment program was instituted with the following ratio of enrollment: 50% white and 50% minority, within

10 percentage points. This program was designed both to maintain the desegregation of the school and to relieve overcrowding. This program will be continued under the Plan.

(vi) *Volta Elementary School (District 4).* This school is located in a neighborhood that is experiencing a rapid growth in minority population, primarily Asian. (It is contiguous to Hibbard.) In order to stabilize the desegregation of the school, a controlled enrollment program will be instituted in September 1982. It will limit the enrollment to the program capacity of the school, and will establish a ratio of enrollment that is: 35% white, 65% minority within a five percentage point range. This program will not act to exclude students who are enrolled in kindergarten or in special education, or who are siblings of students currently enrolled. Students excluded under this program from enrolling in Volta will be provided with the options indicated at pp. 86-87.

4. *Review.* Each year as part of its Annual Desegregation Review, the Board will consider whether additional stabilizing steps are required at any of these schools. It will also examine whether stabilizing methods, including the initiation of controlled enrollment programs, need to be introduced at additional schools. The Board will review each of these schools for possible boundary area changes which would stabilize enrollment composition and not affect the stability of integration or desegration at any contiguous school.

Brief for the United States

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v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

In 1975 and 1976 the Chicago Board of Education placed racial quotas on enrollment at Gage Park and Morgan Park high schools, allegedly as a means of preserving the integrated status of those schools.[1] Petitioners, excluded students, filed suit alleging, *inter alia*, that these policies denied

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[1]The enrollment quota systems are summarized in the Brief for the United States as Amicus Curiae, No. 79-1356, in *Johnson* v. *Board of Education of Chicago*, cert. granted, 448 U.S. 910 (1980). In brief, Gage Park's quota system was adopted in 1975 and established quotas of 48% black, 42% white, 8% Hispanic and 2% "principal's option" for the school as a whole (Pet. App. 45). Morgan Park's quota system applied to the entering freshman class and established quotas of 50% white and

them equal protection of the laws because the quotas excluded only black students from their neighborhood schools (Pet. App. 2). The district court (Will, J.) held that the enrollment policies were constitutional (Pet. App. 43-60) and the court of appeals affirmed (Pet. App. 11-38). This Court granted a petition for a writ of certiorari (*Johnson* v. *Board of Education of Chicago*, 448 U.S. 910 (1980)) but subsequently vacated the court of appeals' decision and remanded the case to the court of appeals "for further consideration in light of the subsequent development described in the suggestion of mootness filed by respondents on October 2, 1980; the response of petitioners filed on October 10, 1980; the response of the United States as *amicus curiae* filed on October 10, 1980; and the reply filed on October 15, 1980" (449 U.S. 915 (1980)). The two developments referred to in those filings were the Board's announcement that it had abandoned use of racial quotas at Gage Park and Morgan Park as of October 1, 1980, and that a consent decree had been entered in *United States* v. *Board of Education of Chicago*, No. 80-C-5124 (N.D. Ill. Sept. 24, 1980) (Br. in Opp. App. A6-A18; Shadur, J.), requiring the Board to adopt a system-wide desegregation plan. On the remand from this Court, the court of appeals remanded the case to the district court "for a determination as to whether the consent decree or any plan implementing the decree had mooted the controversy" (Pet. App. 34).

50% black (Pet. App. 46). No whites were denied admission because of the quotas. Lotteries were used at both schools to determine which black children would be able to attend (Pet. App. 47). Nearly all the excluded students attended a predominantly black under-utilized school nearby (Pet. App. 55). In July 1977, the Board began providing bus transportation to excluded students to facilitate attendance at integrated schools (Pet. App. 57). As of October 12, 1977, 102 of the 1632 students who had been excluded as a result of these quotas had elected to be bused to integrated schools (Pet. App. 58). The record does not contain information on how many excluded blacks are currently attending integrated schools (see page 3, note 2, *infra*).

In April 1981, the Board readopted enrollment quota systems for Gage Park and Morgan Park high schools similar to those originally challenged in this suit (Pet. App. 4). Shortly thereafter, petitioners filed a Motion for Declaration of Non-Mootness and Injunctive Relief. The district court found petitioners' case was not moot because "the Chicago Board of Education has readopted the racial quotas at Morgan Park and Gage Park High Schools," but denied the motion for injunctive relief on the basis of its previous findings of fact and conclusions of law (Pet. App. 40). The district court also denied respondents' motion to supplement the record with evidence of how the 1981 enrollment quota systems and the consent decree were being implemented (*ibid.*).

The Board made changes in the operation of the enrollment quota systems during the period between the district court's 1977 decision and its 1981 decision. For example, in May 1981, the Board added four predominantly white high schools (Kennedy, Hubbard, Bogan and Washington) to the list of schools that students who have been excluded from Gage Park and Morgan Park can attend (Br. in Opp. App. A32-A34).[2] Other changes were made shortly after the court's most recent decision as part of the Board's efforts to implement Phase I of the system-wide desegregation plan by September 1981. See *United States* v. *Board of Education of Chicago, supra.* In August 1981, the Board changed

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[2]It is possible that this change has significantly increased the number of students who attend integrated schools. These schools were not previously open to excluded students because they were not underutilized (Pet. App. 55). A total of 190 students from Gage Park and 150 students from Morgan Park were apparently eligible to transfer to these four schools (Br. in Opp. App. A34). At the start of the 1981-82 school year approximately 300 students were excluded from Gage Park and 200 from Morgan Park (Br. in Opp. App. A33). The record does not reflect how many of these students actually attended these and other integrated schools during the 1981-1982 school year.

the feeder pattern for Gage Park in an effort to increase white enrollment and thereby enable more blacks to attend that school (Br. in Opp. App. A35-A40).[3] The Board also adopted desegregation measures that affected other schools.[4]

In November 1981 the court of appeals affirmed the district court's judgment (Pet. App. 1-10). It found that the case was not moot, applying the dual criteria established by *County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979). The court concluded that it was unnecessary to consider the district court's denial of respondents' motion to supplement the record because it could determine the issue of mootness without such evidence (Pet. App. 7).[5] The court of appeals

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[3]Despite this change, white enrollment at Gage Park declined by 64 students during the 1981-82 school year (Br. in Opp. App. A56).

[4]See *Progress Report on Implementation of the Student Desegregation Plan, Part II* (Aug. 1981). We are lodging a copy of this report with the Clerk of this Court. Those measures, adopted to increase the opportunities for integrated education beginning in September 1981, include feeder pattern changes affecting other high schools within the system (*id.* at 117-125). The students affected by the feeder pattern changes—including white students—are mandatorily excluded from attending what were heretofore their "neighborhood" high schools, except to the extent that their attendance there would promote integration. Thus, some white students are affected by the desegregation plan in a way similar to the effect on students who lose the lottery at Gage Park and Morgan Park. In both instances, excluded students have the option of transferring to other schools if the transfer furthers integration (Br. in Opp. App. A49). Students who are excluded from Gage Park and Morgan Park have a wider range of alternatives (Br. in Opp. App. A50), and are thus less likely to remain with their original peer group.

[5]The court stated that while "further elaboration in the district court as to current feeder patterns and attendance areas would have been useful [on the issue of mootness]" it was unnecessary because "the Board does not contend that the plaintiffs and other black students are not currently being excluded from their neighborhood schools" (Pet. App. 7).

affirmed the denial of injunctive relief because "[w]hen a federal court of appeals has decided an issue in a case, the court's ruling establishes law which it itself should apply to the same issues in subsequent proceedings in that case absent 'unusual and compelling circumstances' " (Pet. App. 8; citation omitted). The court concluded that *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), "does not so clearly conflict with the ruling by this court in its prior opinion as to constitute 'unusual and compelling circumstances' warranting a departure from the law of the case" (Pet. App. 8-9). The court of appeals therefore reinstated its prior opinion.

In January 1982, the Board filed a Comprehensive Student Assignment Plan with the district court in *United States* v. *Board of Education of Chicago, supra*.[6] That plan further modifies the racial quota systems at Gage Park and Morgan Park. Beginning in September 1982, the racial quotas for Gage Park will change from 42% white, 48% black, 8% Hispanic and 2% "principal's option" (Pet. App. 45) to 35% white and 65% minority (Supp. Br. in Opp. App. SA6) and at Morgan Park from 50% white and 50% black (Pet. App. 46) to 35% white and 65% minority (Supp. Br. in Opp. App. SA6). Respondents assert that "[t]his ratio change, together with the other plan provisions, will reduce, if not eliminate, exclusions of minority students from Gage Park and Morgan Park" (Supp. Br. in Opp. 2).[7]

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[6]We are lodging a copy of the January 22, 1982, plan with the Clerk of this Court. Parts of that plan are reproduced in the appendix to respondents' supplemental brief in opposition (SA1-SA6). Parts of an earlier draft of the plan are reproduced in the appendix to respondents' brief in opposition (A41-A64).

[7]The "other plan provisions" referred to presumably include the teaming of Gage Park with predominantly white Hubbard (Br. in Opp. App. A62-A63) and the new special programs for Gage Park and Morgan Park designed to attract more white students and thereby enable more blacks to enroll (*id.* at A61). The plan also provides for the creation of six new metropolitan high schools (*id.* at A58-A59) which

The United States has concluded that the proposed Comprehensive Student Assignment Plan is acceptable.[8] Judge Shadur now has the plan under advisement, and will consider the comments of interested groups before deciding whether the plan is constitutionally adequate and complies with the requirements of the consent decree.[9]

DISCUSSION

1. The court of appeals correctly concluded that this case is not moot. The Board has readopted racial quotas for Morgan Park and Gage Park that are similar to the quotas petitioners initially challenged, and there is no evidence that persons who were excluded by the allegedly illegal policies are now enrolled in those schools. See *County of Los Angeles* v. *Davis, supra*. However, in simply "reinstat[ing] its prior judgment and opinion" (Pet. App. 8), the court of appeals failed to adhere to the mandate of this Court which vacated the lower court's previous decision and remanded

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should further increase the opportunities for all students to obtain an education in an integrated setting. Mandatory reassignment techniques, including transportation, will be employed beginning in the Fall of 1983 should the voluntary techniques fail (*id.* at A63-A64).

[8]We are lodging a copy of our assessment of the plan, which we have filed in Judge Shadur's case, with the Clerk of this Court. Our acceptance of the plan is conditioned upon its achieving a unitary school system within an acceptable period of time. We believe that it is reasonably likely that this goal can be achieved through the plan's voluntary methods. However, if these techniques fail, mandatory techniques can be employed as provided for in the plan.

[9]Petitioners have not to date sought to participate in the suit before Judge Shadur. Several interested groups, including the Mexican-American Legal Defense Fund, the NAACP and the Chicago Urban League, have participated. The Chicago Urban League submitted an assessment of the plan which criticizes the Board's use of racial quotas at Morgan Park and Gage Park. The League suggests that such quotas be employed at predominantly white schools as a means of equalizing the burdens of desegregation. We are lodging copies of the Urban League assessment and our response with the Clerk of this Court.

"for further consideration *in light of the subsequent development* described in the suggestion of mootness [and other filings]" (449 U.S. 915 (1980); emphasis added). The case was not remanded solely for a determination of whether it was moot (compare *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, 542 (1973)). The court of appeals should have reconsidered the constitutionality of the quota systems in the context of the implementation of the consent decree; since this Court vacated the court of appeals' previous decision, the doctrine of the law of the case is inapposite. See *County of Los Angeles* v. *Davis, supra*, 440 U.S. at 634 n.6; *O'Connor* v. *Donaldson*, 422 U.S. 563, 577-578 n.12 (1975); *A.L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 329-330 (1961); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

2. Because there has been no reconsideration in light of recent developments, the record in this case is not adequate for this Court to render an opinion on the constitutionality of the racial quotas as they now operate and are likely to operate for the foreseeable future. According to petitioners, the gravamen of the Board's quota system is that "[b]lack children alone are stigmatized as unwanted in their neighborhood school, when no other child in Chicago is so treated. And the vast majority of excluded blacks did not obtain an integrated education, even after the * * * adoption of an optional busing program" (Pet. 17). When that issue was first presented to the district court in 1977, the factual record contained up-to-date information on the reasons for adopting the quota system, the availability of other alternatives, the number of students excluded by the quota and the number of excluded students who were attending integrated schools. Moreover, the issue of whether black students alone bore the burden of desegregation could be decided solely with reference to the Board's treatment of students at Gage Park and Morgan Park because

these were the only schools where mandatory desegregation measures were in effect.[10]

Significant changes have been made in the quota system since 1977, and the quotas are now part of a system-wide desegregation plan which the Board is in the process of implementing. The record in this case does not adequately reflect these changes. We do not know the actual impact of the Board's recent efforts to increase opportunities for excluded students to obtain an integrated education, nor is there any evaluation of the probable impact of the recently adopted changes in the enrollment quotas on the number of students who will be excluded from Gage Park and Morgan Park in future years. The courts below did not consider whether the desegregation measures which are now in effect or proposed at other schools impose a comparable burden on whites, or whether blacks as a group unjustifiably bear a disproportionate share of the burden of desegregation under the system-wide plan. The record does not reveal whether other alternatives were available and considered when the quotas were readopted and, if so, whether the Board had valid reasons for rejecting these alternatives. These factual issues should be explored by the lower courts

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[10]In our brief on the merits when this case was last before this Court, we argued that the enrollment quotas were unconstitutional as then used but we also noted that "an important distinction exists between their use at only one or two neighborhood schools and their use as part of a comprehensive desegregation plan" (79-1356 United States Brief 28). Thus, when quotas are used as part of a system-wide plan it is likely that racial isolation will be reduced in the system as a whole, and that racial imbalance will not simply be shifted from one set of schools to another. A system-wide approach also ensures that the school authorities have considered the impact of their actions beyond the affected schools. *Keyes* v. *School District No. 1*, 413 U.S. 189, 203 (1973). Whenever a system-wide plan is put into effect, it contains features that prevent some students from attending the schools that they would have attended but for the desegregation efforts. The proposed system-wide plan for Chicago is no exception.

before a decision is reached on the constitutionality of the quotas as they now operate. See, *e.g.*, *Mitchell* v. *McCunney*, 651 F. 2d 183, 187 (3d Cir. 1981); *Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F. 2d 705, 720-721 (2d Cir. 1979); *Fitzpatrick* v. *Board of Education of Enid Public Schools*, 578 F. 2d 858, 861 (10th Cir. 1978); *Arvizu* v. *Waco Independent School District*, 495 F. 2d 499, 504-507 (5th Cir. 1974). In sum, "sound discretion withholds the remedy where it appears that a challenged 'continuing practice' is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted." *A. L. Mechling Barge Lines, Inc.* v. *United States, supra*, 368 U.S. at 331; see *Richardson* v. *Wright*, 405 U.S. 208 (1972).

3. The Court accordingly should grant the petition, summarily vacate the court of appeals' decision and remand the case for further proceedings. On remand Judge Will could decide the constitutionality of the quotas in view of the changed circumstances, or this case could be reassigned to Judge Shadur and consolidated with *United States* v. *Board of Education of Chicago, supra*. In either event, the remand would insure that the lower courts will comply with this Court's original mandate (see *Stanton* v. *Stanton*, 429 U.S. 501 (1977)); it would allow petitioners to challenge the constitutionality of the quotas as they now operate and to obtain effective injunctive relief if they succeed; it would permit the respondents to introduce evidence concerning the current operation of the quotas and their efforts to implement a system-wide desegregation plan; and it should

provide an adequate record if either party again asks this Court to consider the constitutionality of these quotas.[11]

Although, for the reasons we have stated, we do not believe the question presented is presently ripe for review by this Court, a denial of certiorari would leave intact the lower courts' failure to follow the prior directions of this Court in this case. Furthermore, the court of appeals' decision upholding the constitutionality of these quotas would become *res judicata* on the question presented in this case. When the court in *United States* v. *Board of Education of Chicago, supra*, considers whether the burdens of desegregation are fairly apportioned under the system-wide plan, it should not be impeded by any constraints imposed by the court of appeals' decision in this case.

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[11] Petitioners contend (Reply Br. in Support of Pet. 3) that the procedural record here indicates that "changes will continue to be made indefinitely * * * to avoid this Court's review." While the record is not without support for petitioners' view of respondents' litigating strategy to date, the Board's quota system and its other desegregation policies are now embodied in a system-wide plan that is subject to court approval. The court's continuing jurisdiction (Br. in Opp. App. A7) eliminates the possibility that the Board can henceforth unilaterally modify these policies to avoid a definitive judicial test.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals summarily vacated and the case remanded for further proceedings.

Respectfully submitted.

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